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SUPREME COURT, U.S.

74-5968

IN THE SUPREME COURT OF
THE UNITED STATES
1974 TERM

JOHN A. GEDERS,

Petitioner,

v.

UNITED STATES OF AMERICA

Seymour L. Honig
215 Madison Street
Suite 311
Tampa, Florida (33602)
Co-counsel for Petitioner

Richard H. McInnis
215 Madison Street
Suite 509
Tampa, Florida (33602)
Co-counsel for Petitioner

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IN THE SUPREME COURT OF
THE UNITED STATES

1975 TERM

No. A-562

JOHN A. GEDERS,

Petitioner,

v.

UNITED STATES OF AMERICA

Petition For a Writ of Certiorari
To The United States Court of
Appeals For the Fifth Circuit

The Petitioner, John A. Geders, prays that a Writ of Certiorari issue to review the judgment/opinion of the United States Court of Appeals For The Fifth Circuit entered on October 7, 1974 and re-affirmed on December 6, 1974 following denial of Petition For Re-hearing.

OPINION BELOW

The opinion of the United States Court of Appeals For The Fifth Circuit, as yet unreported, appears at Appendix A, infra, said opinion of which affirmed the judgment of the United States District Court, Middle District of Florida, Tampa Division.

JURISDICTION

The order or judgment of the United States Court of Appeals For The Fifth Circuit was entered on October 7, 1974. (See Appendix Exhibit A, infra.) Application For Extension Of Time was timely filed with the Supreme Court of the United States and an Order Extending Time To File Petition For Writ of Certiorari in this matter was signed by the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States on January 9, 1975. The said Order Extending Time To File Petition For Writ of Certiorari ordered the time for filing a Petition For Writ of Certiorari in the above-styled cause extended to and including February 4, 1975. This Petition For Writ of Certiorari was filed on February 4, 1975, together with Motion For Leave To Proceed In Forma Pauperis supported by Petitioner's Affidavit of Insolvency and Request For Leave To Proceed In Forma Pauperis. The jurisdiction of this Court is involved under 21 U.S.C., Section 952 and 18 U.S.C., Section 371.

QUESTIONS PRESENTED FOR REVIEW

Point One(I)

DID THE COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STAGE OF THE TRIAL DEPRIVE DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL?

Point Two(II)

DID THE COURT COMMIT PREJUDICIAL ERROR BY ALLOWING GOVERNMENT WITNESS, CHARLES HUDSON, TO OFFER UNCORROBORATED HEARSAY TESTIMONY, AFTER DEFENDANT GEDERS HAD RESTED, THAT HE HAD CONDUCTED AN INVESTIGATION CONCERNING THE DEFENDANT GEDERS, HAD TALKED TO CONFIDENTIAL INFORMERS AND EXAMINED INTELLIGENCE FILES AT THE HILLSBOROUGH COUNTY SHERIFF'S OFFICE AND HAD ALLEGEDLY LEARNED THAT DEFENDANT GEDERS HAD ENGAGED IN OTHER SMUGGLING ACTIVITIES DURING A TWO TO THREE YEAR PERIOD?

STATEMENT OF THE FACTS

John A. Geders and Michael J. Fink, Jr. were charged by Indictment with three violations of Federal law, to wit: Count I - Conspiracy to import approximately one thousand pounds of marijuana into the United States in violation of 21 U.S.C., Section 952(a) and 18 U.S.C., Section 371; Count II - Illegal importation of said marijuana into the United States; and Count III - Illegal possession of marijuana inviolation of 21 U.S.C., Section 841(a)(1). Both defendants were convicted on all three counts in the U.S. District Court, Middle District of Florida, Tampa Division, with each defendant receiving 3-year sentences on each count, to be served concurrently.

The Government alleged that Petitioner Geders, along with Fink, conspired with seven other individuals, to wit: Rufus Randolph Surles, Jr., James M. Mahoney, Randy Kilgore, Fred Fink, Sr.(father of Michael J. Fink), Steven Patrick, Tom Waddington(now deceased) and David Butler, to smuggle marijuana into this country by air from Colombia, South America, via Inagua, The Bahama Islands. According to the prosecution, the plot germinated in September of 1972 when Geders, Kilgore and Fink(Jr.) concluded that together they possessed the wherewithal to smuggle a large quantity of marijuana into this country. Geders allegedly agreed to provide a South American "contact" or drug supply while Fink(Jr.) promised to find financial backing for the venture. Kilgore assured the others that he would make arrangements with a knowledgeable and trustworthy pilot who could be able and willing to fly the cargo of drugs into the United States undetected.

Fink(Jr.) allegedly introduced Mahoney and Waddington to the scheme and they agreed to provide the necessary capital. After several false starts apparently, Kilgore found Butler, a pilot with access to a

Piper Aztec aircraft, who was willing to make the trip to Colombia for a $10,000.00 fee plus expenses and fifty pounds of marijuana. Additional conspirators apparently appeared including Surles, who agreed to provide a camper truck into which the marijuana was to be transferred upon the plane landing. Patrick agreed to drive the camper truck.

On November 26, 1972 Butler, Geders, and Mahoney boarded Butler's rented aircraft and took off for Colombia, South America. On the return trip, after stopping at Inagua, The Bahamas Islands, the plane landed at the pre-arranged location near to Tampa, Florida. The marijuana was transferred from the aircraft to the camper truck, which began its departure from the landing site accompanied by Kilgore and Fink(Jr.) in a second vehicle.

At this point Federal agents, who had earlier been informed by the plane's pilot, Butler, of the entire undertaking, closed in on the defendants, at which point the entire amount of illegally imported marijuana was recovered, except fifty pounds, which was kept by the pilot as part of his consideration for making the trip (and presumably, although incredibly) for working with the Government as an undercover (double) agent. In addition, the United States Customs Service agreed to permit Butler to retain the generous fee paid to him by the other conspirators.

The trial of the conspirators began on October 9, 1973. Prior to this date, Kilgore and Patrick pleaded "guilty" to a single conspiracy count and agreed to testify for the prosecution. Although Butler was indicted, along with the others, the Government later moved to dismiss the charges against him and the Court granted the motion.

As his primary defense at trial, the Petitioner Geders argued that he had been entrapped by Butler, the Government informer, contending that not only did Butler assist him in furthering the importation scheme but actually induced him to commit the crime, while serving as a Government informer, if not an agent. Petitioner Geders further testified that when the aircraft had alighted at Inagua on the way back to the United States, and being tipped that Butler was suspected of working with law enforcement, that he (Geders) attempted to persuade Butler to dump the marijuana into the sea, but that Butler would not permit such an unloading of the contraband until the designated rendezvous point had been reached.

On the other hand, the Government insisted that Butler had, at all times, merely assisted a plot which had begun before he entered the picture, and that anything he did which appeared to further the conspiracy was done to gain the confidence of the conspirators.

During the trial, the Government in rebuttal, in an effort to establish the absence of entrapment, introduced uncorroborated hearsay testimony regarding Petitioner Geders' alleged predisposition to engage in similar illegal activities as those with which he was charged and convicted in the case sub judice, all of which became the first of two major questions of law to be reviewed by the appropriate appellate courts.

In addition, on appeal, Petitioner Geders contended that an order of the trial court placed him incommunicado with his attorney of record for a 16-hour period, effectively denying his Sixth Amendment right to counsel during the trial proceeding.

STATEMENT OF THE CASE

Petitioner, John A. Geders, was charged and convicted on all three counts of a Grand Jury indictment charging him with:

(a) Conspiring to import approximately one thousand pounds of marijuana into the United States, in violation of 21 U.S.C., Section 952(a) and 18 U.S.C., Section 371.

(b) Illegal importation of said marijuana into the United States; and

(c) Possession of marijuana in violation of 21 U.S. C., Section 841(a)(1).

Order, judgment and sentence were duly entered and imposed in this cause by the Honorable Ben Krentzman, Senior Judge of the United States District Court, Middle District of Florida, Tampa Division, in Case No. 73-69-Cr-T-K.

The Petitioner, John A. Geders, thereafter timely filed his Notice of Appeal and the aforesaid Order, Judgment and Sentence were taken on appeal to the United States Court of Appeals For The Fifth Circuit in the following styled case:

Michael J. Fink and
John A. Geders,
Appellants,
v.
United States of America,
Appellee.

Case No. 73-3966

On October 7, 1974 the United States Court of Appeals For The Fifth Circuit entered its opinion and judgment affirming the judgment of the aforementioned United States District Court For The Middle District of Florida, Tampa Division. (A copy of said opinion and a copy of said judgment of the United States Court of Appeals For The Fifth Circuit are attached herewith and incorporated herein as Appendix Exhibits A and B, respectively.)

Petition For Re-hearing was thereafter timely filed on behalf of the Petitioner herein, John A. Geders,with the Fifth Circuit entering its Order Denying Petition For Re-hearing on December 6, 1974. (A copy of the Order Denying Petition For Re-hearing is attached herewith and incorporated herein as Appendix Exhibit C.)

Subsequently, following Petitioner Geders' Motions, the Fifth Circuit handed down its recall and stay of its earlier judgment previously issued as mandate pending the timely filing and disposition of a Petition For Writ of Certiorari to this Honorable Court, with that appellate court further ordering the reinstatement of Petitioner Geders' earlier appeal bond. (A copy of said Order is attached herewith and is incorporated herein as Appendix Exhibit D.)

Application For Extension Of Time Within Which To File Petition For Writ Of Certiorari was thereafter timely filed on behalf of Petitioner Geders in the Supreme Court of the United States. On January 9, 1975 this Honorable Court entered its Order Extending Time To File Petition For Writ Of Certiorari up to and including February 4, 1975.

The Petition For Writ of Certiorari in this cause prays therefore that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals For The Fifth Circuit rendered as aforementioned on October 7, 1974, along with the Order Denying Motion For Re-hearing on December 6, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

As to Point One(I): Sixth Amendment, United States Constitution; Right to counsel in criminal proceeding.

As to Point Two(II): Fifth Amendment, United States Constitution; Deprivation of due process of law.

IN THE SUPREME COURT OF
THE UNITED STATES

1975 TERM

JOHN A. GEDERS, Petitioner,	:	CASE NO. 73-3966
vs.	:	
UNITED STATES OF AMERICA, Respondent.	:	

PETITION FOR WRIT OF CERTIORARI

Petitioner, JOHN A. GEDERS, through his undersigned attorneys, pursuant to Rule 23, Revised Rules, Supreme Court of the United States, petitions this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit to review that Court's affirmation of his conviction in U.S. District Court, Middle District of Florida, Tampa Division, and as grounds therefor would show unto the Court the following as questions of law:

POINT ONE (I)

DID THE COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STATE OF THE TRIAL DEPRIVE DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL?

It would appear that trial court may not have fully apprehended the import of its Order to Defendant Geders vis-a-vis prohibited contact with or access to his attorney during a sixteen hour recess between direct examination and cross-examination of Geders. It should be well noted that while the impression was created by the prosecuting office, in its brief on appeal, that Geders was only ordered by Judge Krentzman to not consult with his attorney regarding the offering of testimony, IN FACT, the trial judge made the Defendant and his counsel totally INCOMMUNICADO to one another for a sixteen-hour period during the trial itself.

The tone for the incommunicado order set by Prosecutor Blasingame should be carefully considered (T-1149):

MR. BLASINGAME:

"Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys-or anyone--about this case at all?"

THE COURT: (T-1153)

"Well, I don't have any questions, Mr. Rinehart, about what you--I think you are a disciplined man. I think you are trained in the law . . . but your client, as far as I know, has not had any legal training . . . and I don't know that he is subject to that same instruction--that he would understand it.

"I think he would understand it if I told him just not to talk to you; and I just think that it is better that he not talk to you about anything." (emphasis added)

Finally, the trial court's question to counsel for Defendant Geders on the following morning (when the trial was resumed) should be carefully noted in determining Judge Krentzman's intent regarding his order to Defendant Geders: (T-1164)

THE COURT

"You have not talked with him (the Defendant Geders) of course, have you?"

MR. RINEHART:

"No, I haven't."

The Fifth Circuit had apparently not previously addressed itself to this particular constitutional question and was forced to align itself with either the Second or Third Circuit, which Circuits hold virtually diametrically opposite decisions on the question, to wit:

The Third Circuit held in U.S. v. Venuto, 182 F.2d 519 (3rd Cir. 1950), as follows:

" . . . To deprive an accused Defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the Defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing a restriction of silence between the accused and counsel during a trial recess. We reject the Government contention that Defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a Federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client, but, as stated in Glasser v. United States, supra, 315 U.S. at page 467:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice

calculations as to the amount of prejudice arising from its denial." By restricting the right of consultation between this Defendant and his counsel during court recess, Defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the Constitution. His objection on this ground and his motion for mis-trial directed to the trial court were well founded. Accordingly, the conviction must be reversed and a new trial granted."

In contrast, the Second Circuit held in U.S. v. Leighton, 386 F. 2d 322 (2nd Cir. 1967) as follows:

"...Leighton's (the Defendants) objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to counsel....at no time during, before, or after the recess did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the Judge's ruling, but the objection appears to be an attempt to sow reversible error into the record rather than an effort to indicate to the trial judge that the attorney and client had something to discuss."

Leighton's reliance upon U.S. v. Venuto, 182 F. 2d 519 (3Cir. 1950), is misplaced....its (the ruling forbidding attorney/client communication)application to the Defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right of effective assistance of counsel, and are convinced that there was none."

The Fifth Circuit aligned itself with the Second Circuit, notwithstanding two United States Supreme Court cases, which can reasonably be interpreted to state that a Defendant's being denied access to counsel during a trial proceeding is, per se, a reversible deprivation of right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution, without a showing of prejudice, to wit:

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 at Page 467:

"...To determine the precise degree of prejudice substained by Glasser as a result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Earlier in the opinion at Page 467, the Supreme Court stated:

"There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected...."

Finally in Chapman v. State of California, 386 U.S. 125, 87 S. Ct 824, Mr. Justice Stewart, concurring in the result, stated at page 837:

"In devising a harmless-error rule for violations of federal constitutional rights, both the Court and the dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were "harmless." Illustrations of the principle are legion...

"... when a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. "Glasser v. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L. Ed 680."

In reading Glasser v. U.S. and Justice Stewarts' concurring opinion in Chapman v. State of California it would appear that the sixteen-hour incommunicado order by the trial court, regarding Defendant Geders' right to the assistance of his counsel during his trial is a per se deprivation of the Defendant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution and the decision by the Fifth Circuit apparently to "indulge in nice calculations as to the amount of prejudice arising from its denial" (during a sixteen-hour period) is inconsistent with this precious constitutional right guaranteed to all federal defendants in criminal trial proceedings.

At the very least, a conflict of Circuit Court rulings on this question of law would appear to provide a basis for this Honorable Court to issue its Writ of Certiorari for the purpose of resolving this conflict of Circuit Court law on the question by review and decision.

POINT TWO (II)

Petitioner Geders further respectfully urges this Honorable Court to review the Fifth Circuit ruling with respect to the following question of law.

DID THE COURT COMMIT PREJUDICIAL ERROR BY ALLOWING GOVERNMENT WITNESS, CHARLES HUDSON, TO OFFER UNCORROBORATED HEARSAY TESTIMONY AFTER DEFENDANT RESTED, THAT HE HAD CONDUCTED AN INVESTIGATION CONCERNING THE DEFENDANT GEDERS, HAD TALKED TO CONFIDENTIAL INFORMANTS AND EXAMINED INTELLIGENCE FILES AT THE HILLSBOROUGH COUNTY SHERIFF'S OFFICE AND HAD LEARNED THAT THE DEFENDANT GEDERS HAD ALLEGEDLY ENGAGED IN OTHER SMUGGLING ACTIVITIES DURING A TWO TO THREE YEAR PERIOD?

The Fifth Circuit in dealing with this question appears to ignore any consideration of the rulings and rationale of Hansford v. United States of America, 303 F 2d 219(D. Of C. Cir. 1962); United States of America v. Johnston, 426 F.2d 112(7th Cir. 1970); and United States of America v. Ambrose, 483 F.2d 742(6th Cir. 1973), regarding the question of uncorroborated hearsay testimony offered by a Government witness during rebuttal to allegedly establish pre-disposition of the defendant to commit the crimes charged.

Petitioner agrees that once the defense of entrapment is raised it is permissible for the Goverament to show in rebuttal that the defendant was a person pre-disposed to commit the offense charged in the instant proceeding.

However, Petitioner further contends that the Fifth Circuit, in its ruling on this question, erroneously applied the standard as to character reputation testimony enunciated in Michelson v. United States, 335 U.S. 469 (1948), rather than applying the law of the three Circuits above cited.

The defense of entrapment and the issue of limitations and requirements imposed on the Government relative to rebuttal testimony probative of defendant's pre-disposition to commit the offense with which defendant is charged is in no way present nor dealt with in the Michelson case.

In the matter sub judice, however, the defense of entrapment was clearly raised, and Agent Hudson was called as a rebuttal witness on behalf of the Government to testify for the limited purpose of matters relating to defendant's alleged pre-disposition to commit the crimes charged against the defendant.

Petitioner, therefore, contends that the rebuttal testimony of Agent Hudson was inadmissible in that it clearly and completely failed to meet the unequivocal requisite standards prior to offering such testimony, as set forth in Hansford, supra; Johnston, supra; and Ambrose, supra.

Petitioner respectfully submits that it is not sufficient, therefore, to find the rebuttal testimony of Agent Hudson, pursuant to the decision and rationale of Michelson. The limitations and requirements of rebuttal testimony relative to the pre-disposition factor countering an entrapment defense goes well beyond the modest standards laid down in the presentation of ordinary character reputation testimony in non-entrapment cases.

In the Hansford case, the United States Court of Appeals, District of Columbia Circuit, ruled that testimony by a police officer in rebutting a claim of entrapment in the sale of narcotics, as to prior alleged sales made by defendant which the officer claimed he had witnessed, was not admissible and prejudicial when the officer's testimony was not corrorobrated by production of the alleged contemporaneous police report nor otherwise substantially corroborated.

In its opinion, the Court dealing with the uncorroborated rebuttal pre-disposition stated:

> "In these circumstances, the defendant had no opportunity to prepare to defend against this other charge and no means of combatting it, save by his own unsupported testimony in denial of the officer's testimony."

In United States v. Johnson, supra, the United States Court of Appeals, Seventh Circuit, adopted Hansford, supra, and in effect found that Hansford was completely consistent with the decisions arrived at in Sorrells v. United States, 287 U.S. 435 (1932) and Sherman v. United States, 356 U.S. 369 (1958).

Further, in the Ambrose case, supra, the Government had called agents to testify that the defendant was a vendor of narcotics, yet none of them knew this of their own personal knowledge. It appeared this information had been obtained from telephone callers and it was not shown that those callers either knew the appellee personally or even from his locality, and it was not indicated that the callers' information was obtained first hand.

The essence of the Ambrose ruling is that such rebuttal pre-disposition testimony was so indefinite that it could give the defendant no opportunity to refute it and concluded that the admission of such uncorroborated, unreliable hearsay evidence allegedly showing pre-disposition of the appellant was highly prejudicial error.

The Court in the Ambrose case quotes Judge Hartigan in Whiting v. United States, 296 F.2d 512, 516-517 (1st Cir. 1961). In the Whiting case the Government attempted to present pre-disposition testimony relating to the defendant by calling to the stand certain rebuttal witnesses who presented hearsay testimony. The Court in Whiting reversed the judgment of conviction and held that the uncorroborated hearsay evidence introduced by the Government was impermissibly unreliable and afforded the defendant no fair opportunity to refute it, the fourth Circuit apparently to adopt this rationale and rule of law.

At the very least, a conflict of Circuit Court rulings on this question of law would appear to provide a basis for this Honorable Court to issue its Writ of Certiorari for the purpose of resolving this conflict by review and decision.

Conclusion And Prayer

Because of the obvious conflict between the Circuit Courts of Appeals on the two questions of law presented by Petitioner Geders and the legal significance of each question presented this Honorable Court has jurisdiction to issue its Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, to review these two questions of law in the cause herein, for which Petitioner respectfully prays.

Respectfully submitted:

SEYMOUR L. HONIG
215 Madisoa Street
Suite 311
Tampa, Florida (33602)
Co-counsel for Petitioner

RICHARD H. McINNIS
215 Madison Street
Suite 509
Tampa, Florida (33602)
Co-counsel for Petitioner

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Petition For Writ of Certiorari has been furnished to John L. Briggs, United States Attorney's Office, U. S. Post Office Building, Tampa, Florida by regular United States Postal Service this 4th day of February, 1975.

Seymour L. Honig

Richard H. McInnis

APPENDIX A

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 74-5968

JOHN A. GEDERS,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1975
CERTIORARI GRANTED APRIL 21, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-5968

JOHN A. GEDERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 73-69 CR-T-K

UNITED STATES OF AMERICA

v.

RUFUS RANDOLPH SURLES, JR.; JAMES M. MAHONEY; MICHAEL J. FINK; RANDY KILGORE; JOHN A. GEDERS; FRED FINK; and DAVID BUTLER

The Grand Jury charges:

COUNT ONE

Beginning on or about September 1, 1972, and continuing until on or about November 26, 1972, in Tampa, Florida and elsewhere in the Middle District of Florida,

RUFUS RANDOLPH SURLES, JR.;
JAMES M. MAHONEY;
MICHAEL J. FINK;
RANDY KILGORE;
JOHN A. GEDERS; and
FRED FINK

did combine and conspire together and with Steven Howard Patrick and James T. Waddington, deceased, named here as co-conspirators but not as defendants, to commit offenses against the United States, that is to unlawfully import marihuana into the United States from Columbia, South America; in violation of Title 21, United States Code, § 952 (a).

On or about the times hereinafter stated the defendants and co-conspirators did commit, among others, the following overt acts in furtherance of the conspiracy and to effect the unlawful purpose thereof:

(1) On or about November 10, 1972, RANDY KILGORE traveled from Tampa, Florida, to Miami, Florida and met DAVID BUTLER at the Marriot Hotel.

(2) On or about November 25, 1972, at Jacksonville, Florida, RUFUS RANDOLPH SURLES, JR. rented a Sandpiper Motorhome.

(3) On or about November 25, 1972, at Tampa, Florida, JAMES M. MAHONEY gave DAVID BUTLER $10,000 cash as prepayment to DAVID BUTLER for flying a Piper Aztec airplane from Tampa, Florida, to Colombia, South America and return to Lehigh Acres, Florida.

(4) On or about November 26, 1972, JOHN A. GEDERS, JAMES M. MAHONEY and DAVID BUTLER flew from Tampa, Florida, to Colombia, South America and back to Lehigh Acres, Florida;

all in violation of Title 18, United States Code, § 371.

COUNT TWO

On or about November 26, 1972, in Lee County, Florida, in the Middle District of Florida,

JAMES M. MAHONEY;
RANDY KILGORE;
JOHN A. GEDERS; and
MICHAEL J. FINK

did unlawfully import into the United States from Colombia, South America, a controlled substance, to wit: approximately 1,000 pounds of marihuana; in violation of Title 21, United States Code, § 952 (a) and 960 (b).

COUNT THREE

On or about November 26, 1972, in Lee County, Florida, in the Middle District of Florida,

JAMES M. MAHONEY;
JOHN A. GEDERS; and
MICHAEL J. FINK

did knowingly possess, with intent to distribute, a controlled substance, to wit, approximately 977 pounds of marihuana; in violation of Section 841 (a)(1), Title 21, United States Code.

COUNT FOUR

On or about November 26, 1972, at Tampa, Florida, in the Middle District of Florida,

JOHN A. GEDERS

did willfully, knowingly and unlawfully carry a firearm during the commission of a felony for which he might be prosecuted in a court of the United States, that is, he did carry a Smith and Wesson Model 36 pistol, .38 caliber while unlawfully importing marihuana into the United States; all in violation of Title 18, United States Code, § 924.

COUNT FIVE

On or about November 26, 1972, in Lee County, Florida, in the Middle District of Florida,

DAVID BUTLER

did knowingly possess, with intent to distribute, a controlled substance, to wit, approximately 50 pounds of marihuana; in violation of Title 21, United States Code, § 841 (a)(1).

A TRUE BILL

/s/ P. R. Lutz
Foreman

JOHN L. BRIGGS
United States Attorney

By: /s/ Oscar Blasingame
OSCAR BLASINGAME
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA—TAMPA DIV.

No. 73-69-Cr. T-K

Microfilmed-Roll No. 59

[Filed Tampa, Fla. Nov 30, 1973, Wesley R. Thies, Clerk]

UNITED STATES OF AMERICA

v.

JOHN A. GEDERS

On this 30th day of November, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Ralph Rinehart

IT IS ADJUDGED that the defendant has been convicted upon plea of Not Guilty and a Jury Verdict of Guilty, of the offense of conspiring, importing and possessing, with intent to distribute, a controlled substance, to wit, approximately 977 pounds of marihuana, in violation of Title 18, Section 371 and Title 21, Sections 841(a)(1), 952(a) and 960(b), U.S.C. as charged in 3 counts of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three Years on count One, Three Years on count Two, and Three Years on count Three, the sentences imposed on counts Two and Three shall run concurrently with the sentence imposed on count One, and that the defendant

shall become eligible for parole at such time as the board of parole may determine. (18 U.S.C. Section 4208(a)(2), or until the defendant is otherwise discharged as provided by law. It is further

ORDERED that the prison sentence imposed herein shall begin on or before noon on December 3, 1973.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

_____

/s/ [Illegible]
United States District Judge.

(Signed) _____
Clerk.

(By) _____
Deputy Clerk.

Trial Transcript Page 124 (lines 8-25), Page 125 (lines 1-9)

(Recess of Court between cross-examination of Government Witness Kilgore by defense counsel Rinehart and Clark with admonitory instructions by the Court to the jury and Kilgore.)

THE COURT: We will have a recess, Ladies and Gentlemen. While you are in the jury room don't discuss this case among yourselves. Remember my instructions in that regard.

You may now go to the jury room.

(Thereupon the following proceedings were had in the absence of the jury:)

THE COURT: Let the record show the Jury has withdrawn.

Mr. Clark, do you wish to cross-examine the witness?

MR. CLARK: I do, Your Honor.

THE COURT: Mr. Kilgore, you may step down during the recess. Do no discuss this case with anyone. Don't talk about it with any attorneys or any Government agents or any other witnesses or anyone.

Do you understand?

THE WITNES: Yes, sir.

THE COURT: Just get yourself a drink of water; and probably the best thing to do after you have refreshed yourself is just to come back and sit in the back of the Courtroom.

THE WITNESS: Yes, sir.

THE COURT: All right. Court will be in recess for ten minutes.

Trial Transcript Page 176 (all), Page 177 (all), Page 178 (lines 1-8)

(Recess of Court for lunch (12:15-1:45 p.m.) during cross-examination of Government Witness Kilgore by defense counsel Clark with admonitory instructions by the Court to jury and Kilgore.)

THE COURT: All right, we are going to recess at this time, Ladies and Gentlemen. It is 12:15.

I will ask you to be back at 1:45. That is an hour and a half. During the interim remember the instructions I have given you, please. Don't discuss this case with anyone or allow anyone to discuss it with you.

Don't read anything about it or look at anything about it or listen to anything about it.

Keep yourselves entirely free of any outside information about this case.

You are now excused and may go out through the Jury room. Be back in there please by 1:45. Thank you.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: Is there any re-cross of the defendant —of the witness?

MR. BLASINGAME: Re-Direct?

THE COURT: Re-Direct.

MR. BLASINGAME: Yes, sir.

THE COURT: You are now excused, Mr. Kilgore, until 1:45. Be back available in the Courtroom at 1:45.

THE WITNESS: Yes, sir.

THE COURT: In the meantime don't discuss this case —what is your view about that?

MR. BLASINGAME: I don't think he should discuss it with anyone, Your Honor.

THE COURT: And that includes Mr. Blasingame and Government agents and any witnesses or anyone.

THE WITNESS: Yes, sir.

THE COURT: You are still on the witness stand, do you understand that?

THE WITNESS: Yes, I do.

THE COURT: Now be careful about that.

Don't even talk with them about the weather. If anybody sees you talking they are going to ask what you talked about. And probably the first thing that is going to happen when you get back on the witness stand, somebody is going to ask you "Did you talk with anybody about this case?" Do you understand?

THE WITNESS: Yes, sir.

THE COURT: And you are under oath.

THE WITNES: Yes.
THE COURT: So I am not telling you what is going to happen. I am telling you what you should do. Just don't talk to anybody about this case.
THE WITNESS: I won't, Your Honor.

(Thereupon the witness retired from the Courtroom and further proceedings were had in the absence of the witness)

Trial Transcript Page 317 (lines 21-25, Page 318 (all)

(Recess of Court overnight during cross-examination of Government Witness by defense counsel Rinehart with admonitory instructions by the Court to jury and Patrick.)

THE COURT: We are going to recess at this time. We will resume tomorrow morning at 9:30.
Ladies and Gentlemen, remember the instructions I have given you.
Keep an open mind about this case.
Don't read anything about it or listen to anything about it or hear anything about it and don't let anyone talk with you about it. Don't talk about it among yourselves.
You are excused and I request you to be in the Jury room by 9:30 tomorrow morning. Thank you. You may go out through the Jury room.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: Mr. Patrick, you will be requested to be here tomorrow morning by 9:30.
THE WITNESS: Yes, sir.
THE COURT: And you are directed not to discuss this case between now and then with anyone. That includes any of the attorneys for the Government or any of the agents of the Government, or anyone else. Do you understand?
THE WITNESS: Yes, sir.
THE COURT: You will be subject to further cross-examination by Mr. Clark.

Do you wish to cross-examine?
MR. CLARK: Yes, Your Honor.
THE COURT: All right, thank you. So you are excused now. Be back by 9:30

Trial Transcript Page 365 (lines 12-21), Page 366 (all), Page 367 (all), Page 368 (lines 1-13)

(Resumption of cross-examination of Government Witness Patrick by defense counsel Clark—resumed from October 10, 1973.)

TESTIMONY OF STEVEN HOWARD PATRICK
(Resumed)

Thereupon, the testimony of the Government witness Steven Howard Patrick, which was interrupted at the close of the proceedings on October 10, 1973, was resumed in the presence of the Jury as follows:

THE COURT: Mr. Patrick you will remember that you are under oath.
THE WITNESS: Yes, sir.
THE COURT: You may cross-examine, Mr. Clark.
MR. CLARK: Thank you.

CROSS-EXAMINATION

BY MR. CLARK:

Q Mr. Patrick, where were you yesterday?
A What time of the day, sir?
Q Well from 9:30 until, say, 2:00 o'clock yesterday afternoon.
A I was in the witness room as far as I can recollect.
Q Right here, right down the hallway?
A Yes, sir.
Q Did you talk to Mr. Kilgore during that time?
A Not about the case; no, sir.
Q You had no discussion with Mr. Kilgore?
A Not about the case; no, sir.

Q Did Mr. Kilgore come and talk to you each time he came out yesterday during the course of his testimony?
A Not about the case; no, sir.
Q Not about the case?
A Not about the case.
Q Did you see Mr. Kilgore last night?
A No, sir—well, I took him home, sir.
Q What did you talk about?
A Just general discussion.
Q You didn't talk a bit about his testimony or a bit about this case?
A No, sir.
Q Did you see Mr. Kilgore yesterday at lunch?
A Yes, sir.
Q Did you talk to Mr. Kilgore about this case then?
A No, sir.
Q When was the first time you saw Mr. Kilgore today?
A The first time I saw him today was approximately 8:30 this morning when I was eating breakfast.
Q And where was that, sir?
A At the Sheraton Motor Inn over here, in town.
Q Did you talk to him then?
A Not about the case; no, sir.
Q Well how long did you talk?
A Well, I have been in his company since 8:30 this morning, sir.
Q You have been with Mr. Kilgore since 8:30 this morning?
A Off and on.
Q Off and on? What did you discuss?
A Just general discussion.
Q You didn't talk a bit about the case.
A Not a bit about the case.
Q And not a bit about what Mr. Kilgore has testified to?
A Not a bit about what he testified to.
I understood that I was under express instructions not to speak about the case. That is why there was no discussion about the case. As the Judge told me yesterday.

Q And you haven't done that?
A I haven't done that.

Trial Transcript Page 435 (lines 3-21)

(Recess of Court (for ten minutes) during cross-examination of Government Witness Patrick by defense counsel Clark with admonitory instructions by the Court to the jury and Patrick.)

THE COURT: All right, ladies and gentlemen, we will have a ten minute recess.
Take the opportunity to refresh yourselves.
Don't talk about this case among yourselves. You may go to the juryroom.

(Thereupon, the following proceedings were had in the absence of the Jury:)

THE COURT: Let the record show the Jury has withdrawn.
And you may be excused for ten minutes, Mr. Patrick. Remember, do not discuss this case with anyone.
THE WITNESS: Yes, sir.
THE COURT: And perhaps, during this short interim, don't talk with anybody about anything.
THE WITNESS: Yes, sir.
THE COURT: All right, Court will be in recess for ten minutes.

Trial Transcript Page 471 (lines 1-17)

(Recess of Court for lunch (1:25-2 p.m.) during cross-examination of Government Witness Patrick by defense counsel Clark with admonitory instructions by the Court to the jury and Patrick.)

Ladies and gentlemen, we are going to recess now. It is now, as you can see, about twenty-five minutes till 1:00.
I will ask you to be back at 2:00 o'clock in the juryroom.
Remember the instructions I have given you, please. Don't talk about the case and so forth.

You may go out through the juryroom.

(Thereupon, the following proceedings were had in the absence of the Jury:)

THE COURT: Mr. Patrick, you are excused. Be back in the witness room by 2:00 o'clock. Don't talk about this case with anyone.

THE WITNESS: Yes, sir.

Trial Transcript Page 840 (lines 20-25), Page 841 (lines 1-20)

(Exchange after jury had retired, following taking of 5th Amendment privilege by Government Witness Butler, between defense counsel Rinehart, Court and Prosecutor Blasingame regarding invoking of the Rule and question of whether case agent Miller could participate in prosecutorial conference.)

MR. RINEHART: Of course we would like to have Mr. Miller reminded that he is under the Rule also and should not discuss his testimony with these other agents,

THE COURT: Don't talk with them, Mr. Miller.

MR. LOWELL MILLER: Yes, sir.

THE COURT: I just did. Anything else?

MR. BLASINGAME: Mr. Miller could be present with us while we confer with them as long as he doesn't suggest anything, can't he? He is the investigating agent on the case.

MR. RINEHART: Your Honor, I would strenuously object, because—

THE COURT: I don't think that is necessary. This is a case where everybody is no concerned about everybody.

I have never seen so much—so many people who have got their fingers in the broth.

Keep Mr. Miller out of the conferences.

All right, that ought to satisfy you.

Anything else about that?

MR. RINEHART: That's about it right now.

THE COURT: If everybody else will be as circumspect about their conduct as this, why that will be all right.

Trial Transcript Page 999 (lines 7-20)

(Recess of Court for lunch during cross-examination of Government Witness Kilgore (recalled) with admonitory instructions by the Court to jury and Kilgore.)

MR. RINEHART: My examination may be a little bit long.

THE COURT: All right, do you object to delaying it until after lunch?

MR. RINEHART: No, I have no objection.

THE COURT: We will recess at this time, Ladies and Gentlemen.

Mr. Kilgore, you are directed to be back here at 1:45.

In the meantime, don't talk to anyone about this case. Do you understand?

THE WITNESS: Yes, sir.

THE COURT: You are excused. Please step down.

Ladies and Gentlemen, please remember the instructions I have given you about your conduct.

Don't talk with anyone about this case and please be back in the Jury room by 1:45.

Trial Transcript Page 1041 (lines 13-25), Page 1042 (all), Page 1043 (all), Page 1044 (all), Page 1045 (Lines 1-11)

(Exchange following recall testimony of Government Witness Kilgore regarding requests for recesses, nature of cross-examination, scheduling of defense witnesses, etc.)

MR. CLARK: Your Honor, it is my understanding that Mr. Buchanan has arrived; and I would like a few minutes to—

THE COURT: All right. Do you want a recess? Is that what you want?

MR. CLARK: Yes, Your Honor.

THE COURT: That is all you have to do. Just ask for a recess.

We will have a recess, Ladies and Gentlemen. Go to the Jury room. Don't talk about this case among yourselves. Thank you.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: Mr. Clark, in the future, if some witness appears don't say a certain Mr. So-And-So and act as if—if you want to convey a message to me, don't also convey one to the Jury.

If the purpose is to tell me what you want, just tell me.

MR. CLARK: Yes, Your Honor.

THE COURT: That you would like a recess to talk to a witness. If you want to mention the witness's name, you may do that.

MR. CLARK: I will do so in the future, Your Honor.

THE COURT: All right. Thank you very much. How long do you want? Do you know?

MR. CLARK: Five minutes?

THE COURT: Well, more than that if you want it. Ten minutes?

MR. CLARK: Ten minutes, if I may, Your Honor.

THE COURT: Yes, sir. You may have it. I asked you.

All right. Now let me say this to you. If you will give more consideration to the form of your questions, you will be able to answer more questions (sic).

I don't want to restrict your right to cross examine; but, if you persist in asking questions as you have, I am going to make the same rulings I make; and I am going to continue to do that as long as you practice in my Court.

You are not going to testify through asking questions.

You can ask a question. You can ask a leading question without testifying.

You may have a different view about that. Your view apparently is that you are supposed somehow to keep from surprising the witness—I mean to keep from apprising the witness of what you want him to know, or to keep from letting him do self-serving declarations, and that you are supposed to do the testifying.

That is the reason that I sustained the objections to your questions.

Now it may be just a firm conviction you have. If it is, I hope it serves you better in other Courts than it will in this one.

Court will be in recess.

(Upon the resumption of the trial after the recess above-indicated, the following further proceedings were had, still in the absence of the Jury:)

MR. CLARK: Your Honor, there is one matter. The next witness to be called is Mr. Buchanan, from the Miami office.

I would like to have Mr. Butler present in the Courtroom so that he can identify Mr. Butler for the Jury.

MR. BLASINGAME: We would object and would stipulate that he knows Mr. David Butler.

THE COURT: Does he say he does not know him?

MR. CLARK: No, sir. I would just like to have him point out Mr. Butler for the Jury.

THE COURT: All right. I have denied that request. If he indicates any question in his mind about who Mr. Butler is—

MR. BLASINGAME: I don't think there will be any question. I think it will come out clearly.

THE COURT: All right. Did you get a copy? I did enter an Order about indigency.

MR. CLARK: Yes, I just received a copy.

THE COURT: All right. It is filed.

Now, let me ask you this. Do you have any other—after we have him, do you have another witness? Do you need a recess to go out and talk to somebody?

MR. CLARK: No, sir.

THE COURT: All right.

MR. RINEHART: I may need about five minutes because I am trying to decide now whether to put the Defendant on the stand.

THE COURT: Well if you would just ask me, "May we have a recess", then I will know. That is all you need to do. All right.

Trial Transcript Page 1076 (lines 24-25), Page 1077 (lines 1-11)

(Exchange following re-cross examination by Prosecutor LaSpada of Witness Buchanan when Court granted recess (for five minutes) to defense upon request by counsel Rinehart with admonitory instructions by the Court to jury.)

MR. RINEHART: May we have a five minute recess?

THE COURT: Yes, sir. The last time we took five minutes—I'm not being critical—but I do believe in calling facts facts. The last one who asked for a five minute recess, we took twenty.

How much time do you really think it would take?

MR. RINEHART: About five minutes.

THE COURT: Fine. I will hold you to it. Thank you.

We will be in recess for five minutes. Don't talk about the case among yourselves.

Trial Transcript Page 1147 (lines 20-25), Page 1148 (all), Page 1149 (all), Page 1150 (all), Page 1151 (all), Page 1152 (all), Page 1153 (all), Page 1154 (line 1)

(Exchange following completion of direct examination of Defendant Geders by counsel Rinehart and request by Prosecution for recess before commencing cross-examination of Defendant Geders and request by Prosecution for an admonitory order by the Court against Defendant Geders to place him incommunicado during the overnight recess of the trial proceeding with admonitory instructions by Court to jury and Defendant Geders.)

THE COURT: Now I am sure the jury would be willing to stay some additional time and I would have no objection to asking them. I do note that it is five minutes to 5:00 o'clock. Mr. Clark, what do you wish to do?

MR. CLARK: I have no questions for this witness, Your Honor.

THE COURT: Does the Government wish to proceed with its cross-examination now? There are reasons why you may or may not—except for the time factor—I don't know.

MR. LaSPADA: We would prefer to recess.

THE COURT: All right. You may.

Ladies and gentlemen, I'm going to ask you to stay a reasonable time.

THE CLERK: He said he wanted to recess.

THE COURT: Sir?

MR. LaSPADA: I would prefer to recess, Your Honor.

THE COURT: Oh, to recess.

MR. LaSPADA: Until tomorrow.

THE COURT: You want to defer cross-examination.

MR. LaSPADA: To defer the cross-examination.

THE COURT: Well, Ladies and Gentlemen, I'm going to excuse you now and ask you to remember all the instructions I have previously given you.

Don't read anything about this case or hear anything about it or let anyone discuss it with you in any way.

You are excused, to come back to the Jury Room tomorrow morning by 9:30.

Please be there, and go out now through the Jury Room. Thank you.

(Thereupon the following proceedings were had in the absence of the Jury:)

THE COURT: (Addressing the witness) All right, you may step down and thank you.

MR. BLASINGAME: Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys—or anyone—about this case at all?

MR. RINEHART: If he were instructed not to talk to his attorney, I feel that it would be improper. I think I always have the right to talk to my client.

MR. BLASINGAME: I don't think so.

THE COURT: Well I don't know whether you requested that I so instruct another witness when there was a recess, to that effect; but you do—let's make this clear—you always have the right to talk to your client—but except for the accident—and "accident" means something over which you have no control—the cross-examination would have been right now and you would not have had an opportunity to talk to him.

Now, because of the fact that it is 5:00 o'clock and we are recessing until tomorrow, you would have that opportunity.

If you had requested the opportunity and this had been 2:00 o'clock—and if you had said "If the Court please, I would like to have a recess"—and then, outside the presence of the Jury, had said, "because I want to talk to my client"; what would I have said?

MR. RINEHART: You probably would not have granted the recess, Your Honor.

THE COURT: Should I have?

MR. RINEHART: Not if there was something else to do, Your Honor.

THE COURT: Well would you have had a right to just talk to your client while he is subject to cross-examination?

MR. RINEHART: Well I would not—

THE COURT: Would you have?

MR. RINEHART: I would not instruct my client anyway.

THE COURT: Well would you have talked to him? Would you have had a right to confer with him? That is what I want to know.

MR. RINEHART: If there were matters that I felt I had not brought out on Direct and that I should have covered—

THE COURT: Before he is cross-examined?

MR. RINEHART: Even before he is cross-examined. Sometimes we remember things we did not—

THE COURT: Yes, sir. That is the reason you are entitled to Redirect.

MR. RINEHART: Right.

THE COURT: Now I would appreciate it if you would answer my question. We have had a little trouble about being responsive.

MR. RINEHART: All right.

THE COURT: My question is: While a witness is subject to cross-examination, even though he is a defendant, does his attorney have the right to confer with him before he is cross-examined?

You have been practicing law for a long time.

MR. RINEHART: I fel that I do have the right to confer with him but not to coach him as to what he

may say on cross-examination or how to answer questions.

THE COURT: Then what else would you need to talk to him about?

MR. RINEHART: I don't know. Such as whom should I call as the next witness.

THE COURT: All right.

MR. RINEHART: There are numerous strategic things that an attorney must confer with his client about.

THE COURT: Well I don't have any questions, Mr. Rinehart, about what you—I think you are a disciplined man. I think you are trained in the law. And I think if you should tell me, for instance, that you would not discuss this direct testimony with your client I would accept that statement without any qualification.

MR. RINEHART: Your Honor, I can assure you of that.

THE COURT: I understand that. But your client, as far as I know, has not had any legal training; and I don't know anything about him other than what I have heard here today. And I don't know that he is subject to that same instruction—that he would understand it.

I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything.

I think you might ask him right now—right here while we are here—what witnesses he thinks you ought to call in the morning.

Let's put it this way. You ask him right now if he thinks there are any witnesses you ought to call during the evening. If anything comes up after he has been cross-examined, and after you have had an opportunity for redirect, we would have a recess and you would have all the time you need to talk to him about strategies or anything else. We will take the rest of this month, if necessary, to give you an opportunity and him an opportunity for a fair trial. But we are not going to let strategy take the place of this situation.

And I have held that I find that I don't think you would do anything wrong; but I think it would be better,

under the circumstances of this case. And that is my ruling.

MR. RINEHART: If that is your ruling, Your Honor, we will obey it.

THE COURT: All right. Now you just move to the side, please.

Now, Mr. Geders, will you stand up. I direct you not to discuss your testimony in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined.

Do you understand that?

MR. GEDERS: I understand.

THE COURT: All right, thank you. All right, the Court will be in recess.

Trial Transcript Page 1163 (lines 24-25), Page 1164 (all), Page 1165 (lines 1-3)

(Exchange on morning following 16-hour overnight recess of Court at which time the trial proceeding resumed.)

MR. RINEHART: I do, Your Honor. I would like to call John Geders back to the stand for further direct testimony.

As I understand, cross-examination has not commenced yet.

THE COURT: All right. I heard what you say.

What says the Government?

MR. BLASINGAME: We object, Your Honor. I think he had adequate time yesterday to direct-examine him. He does have a right to Redirect.

We think it is outside of the procedure that should be followed.

THE COURT: You have not talked with him, of course, have you?

MR. RINEHART: No, I haven't.

This, of course, is not directly related to what I brought out on direct. This is additional matter that I feel is relevant and should be brought out on direct.

THE COURT: Well, it is obvious to me that this case has already taken too long. It was my fault, al-

though I don't know what I could have done about it otherwise.

But I am certainly not going to prohibit you from putting on such testimony as you want to and you may do it.

Anything else?

MR. BLASINGAME: Nothing further at this time.

Trial Transcript Page 1256 (lines 14-24), Page 1257 (lines 1-20)

(Exchange, after jury had retired, during cross-examination of Defendant Geders by Prosecution.)

THE WITNESS: Your Honor?

THE COURT: No, sir. You can go talk to your—don't you say anything.

THE WITNESS: May I talk with my attorney?

MR. RINEHART: No. The Court has already ruled. There is no reason for you to talk to me in reference to this matter.

THE WITNESS: All I wanted to say—

THE COURT: Now just a moment. You know, there is a saying about what a man—the position a man gets himself in when he represents himself, maybe.

It is not normally proper for you to talk to a client while he is on cross examination.

You successfully raised the issue. It is in the record. If I am wrong, why you have the benefit of it.

The statement is not going to get in the record, and the jury has not heard anything about what has happened here. So if anybody wants to dispute some of the statements about this and that—

MR. RINEHART: It has already been ruled on, so—

THE COURT: It is not going before the jury.

MR. RINEHART: There is no need to talk about it any more.

Trial Transcript Page 1334 (lines 15-24), Page 1335 (all), Page 1336 (all), Page 1337 (lines 1-3)

(Recess of Court at lunch (11:50-1:30 p.m.) following conclusion of Prosecution's cross-examination of Defendant Geders and before re-direct examination of Defendant Geders by defense counsel Rinehart, with admonitory instructions by the Court to the jury.)

MR. LaSPADA: Your Honor, I have no further questions of this witness.

THE COURT: It is ten minutes until twelve. Would you like to proceed now or would you—

MR. RINEHART: I would rather take the recess for lunch, Your Honor.

THE COURT: All right. I think we might.

Ladies and Gentlemen, we will have a recess for lunch and I will ask that you be back in the juryroom by 1:30. Remember all of the instructions I have given you.

Don't talk about this case among yourselves or allow anyone to talk with you about it.

Don't read anything about it or look at anything about it or hear anything about it.

You may now go out through the jury room.

Please be back by 1:30. Thank you.

'Thereupon the following proceedings were had in the absence of the jury:)

THE COURT: You may step down.

MR. BLASINGAME: May he be instructed that he is still not to confer with anyone whatsoever?

MR. RINEHART: Your Honor, I know of no way that I can properly examine my client on redirect unless I talk to him about the cross examination and about other factors pertaining to this case.

THE COURT: Well, if I had not recessed what would you have done?

MR. RINEHART: If you had not recessed—which has not happened of course.

THE COURT: Well, if I had not?

MR. RINEHART: Then I probably would not have discussed it.

THE COURT: Because it is a question now of—you say that you know of no way that you would have been able to do it; so I thought I would ask you what you would have done.

MR. RINEHART: I would have probably gone ahead without talking to him.

THE COURT: Well, isn't that normal procedure?

MR. RINEHART: It is if there is no recess.

THE COURT: Mr. Rinehart, I don't think you are entitled to that right, but I am going to give the defendant that right. He can talk to you.

MR. RINEHART: Thank you.

THE COURT: And you can talk to him. But he is not entitled to it.

MR. RINEHART: All right.

THE COURT: Thank you. The Court will be in recess until 1:30.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 73-3966

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL J. FINK AND JOHN A. GEDERS,
DEFENDANTS-APPELLANTS

Oct. 7, 1974

Defendants were convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of conspiracy to import marijuana, illegal importation of marijuana and possession of marijuana and they appealed. The Court of Appeals, Moore, Circuit Judge, held that testimony of federal narcotics agent that one defendant had reputation in community as drug smuggler and distributor was admissible to rebut entrapment defense; that refusal to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss case with counsel for defense was within trial court's discretion; and that directing defendant not to discuss his testimony with anyone until after recess did not constitute reversible error absent showing of harm.

Affirmed.

1. Criminal Law Section 37(1)

Purpose of entrapment defense is to inhibit the use by the Government of pressure tactics which cause the commission of an offense by one who is not ordinarily disposed to commit it.

2. Criminal Law Section 37(1)

Entrapment defense is not readily available to one who has evidenced an inclination to commit the type of offense with which he is charged.

3. Criminal Law Section 376

Once defendant indicates his reliance on entrapment defense, Government is permitted to tender evidence on defendant's predisposition to commit the type of crime charged.

4. Criminal Law Section 376

"Reputation" or "character" evidence is admissible to rebut an entrapment defense.

5. Criminal Law Section 376

In prosecution for conspiracy to import marijuana and importation and possession of marijuana, testimony of narcotics agent that one defendant has reputation in community as drug smuggler and distributor was admissible to rebut entrapment defense. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 21 U.S.C.A. §§ 841(a)(1), 952(a).

6. Witnesses Section 274(1)

Refusal to permit defense to question prosecution witness, who had testified in rebuttal of defendant's entrapment defense that defendant had reputation in community as drug smuggler and distributor, concerning specific events or activities of defendant that gave rise to his adverse public image was within trial court's discretion.

7. Criminal Law Section 379

Character reputation is established not by what one knows to be fact concerning another but what one has heard in the community about the person in question.

8. Criminal Law Section 380

Evidence of specific acts or conduct is not admissible to prove or disprove the reputation that a defendant holds in his community.

9. Criminal Law Section 376

Predisposition to commit crime of type of which the defendant stands accused may be demonstrated for purpose of rebutting entrapment defense by evidence that defendant has reputation of one who has committed a particular type of illegal action in his community.

10. Criminal Law Section 589(1)

Refusal to grant defendant continuance after prosecution witness has testified in rebuttal of entrapment defense concerning defendant's reputation in community as drug smuggler and distributor was within trial court's discretion.

11. Criminal Law Section 569

Evidence, inter alia, that defendants had taken part in transferring cargo of marijuana from plane to waiting vehicle sustained determination that defendants were not entrapped through pilot who had informed authorities of plan for importing marijuana and that defendants had not renounced their enterprise of smuggling marijuana, despite contention that defendants had attempted to persuade pilot to slow down during flight to permit cargo to be pettisoned. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 21 U.S.C.A. §§ 841(a)(1), 952(a).

12. Criminal Law Section 627.5(2)

Except for capital cases, question of extent of defense discovery, at least that discovery which requires judicial assistance, is matter within discretion of trial court. 18 U.S.C.A. § 3432.

13. Criminal Law Section 627.5(2)

In exercising its discretion with respect to determining extent of defense discovery, trial court must weigh variety of factors and must balance need of accused for depositions requested against possibility that prospective witnesses might be harassed or intimidated as result of their submission to the discovery process.

14. Criminal Law Section 627.5(2)

Refusal to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss case with counsel for defense was within trial court's discretion in view of clear evidence that defendants were capable of harassment.

15. Criminal Law Section 666½

Trial court did not improperly refuse to interfere with alleged policy of United States Customs Service prohibiting its agents from discussing facts of pending cases with defense counsel without permission of United States attorney where, when defense counsel reported to trial court that federal agents had refused to speak with defense without permission of United States attorney, trial court stated that defense counsel had the right to talk to any witnesses who wanted to talk with defense counsel and ordered United States attorney to "just stay away."

16. Criminal Law Section 1166.11

Depriving defendant of assistance of counsel during 16-hour recess by directing him not to discuss his testimony with anyone during the recess did not constitute reversible error absent showing of harm to defendant.

Appeals from the United States District Court
for the Middle District of Florida

Before MOORE,* AINSWORTH and RONEY, Circuit Judges.

MOORE, Circuit Judge:

This is an appeal by John Geders and Michael Fink from a judgment of conviction by the United States Dis-

* Hon. Leonard P. Moore, Senior Circuit Judge for the Second Circuit, sitting by designation.

trict Court for the Middle District of Florida, the Hon. Ben Krentzman, *Judge*, entered pursuant to a jury verdict. Appellants were convicted on all three counts of an indictment charging them with: (a) conspiracy to import approximately one thousand pounds of marijuana into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 371; (b) illegal importation of said marijuana into the United States; and (c) possession of marijuana in violation of 21 U.S.C. § 841(a)(1).

The government alleged that appellants Geders and Fink conspired with seven others, Rufus Randolph Surles, Jr., James M. Mahoney, Randy Kilgore, Fred Fink, Steven Patrick, Tom Waddington (now deceased) and David Butler, to smuggle marijuana into this country by air from Colombia, South America, via Inagua, The Bahama Islands. According to the prosecution, the plot germinated in September 1972 when John Geders, Randy Kilgore and Michael Fink concluded that together they possessed the wherewithal to smuggle a large quantity of marijuana into this country. Geders agreed to provide a South American "contact" or drug supply while Fink promised to find financial backing for the venture. Randy Kilgore assured the others that he would make arrangements with a knowledgeable and trustworthy pilot who would be able and willing to fly the cargo of drugs into the United States undetected.

Michael Fink made good on his promise. He introduced James M. Mahoney and Tom Waddington to the scheme, and they agreed to supply the necessary capital. After a few false starts, Randy Kilgore found David Butler, a pilot with access to a Piper Aztec aircraft, who was willing to make the trip to Colombia for a $10,000 fee plus expenses and fifty pounds of marijuana. Additional conspirators also emerged. Rufus Randolph Surles, Jr., agreed to provide a trailer, of the type normally used by vacationers on camping trips, to which the marijuana could be transferred once it was landed. Steven Patrick agreed to drive the camping trailer.

In David Butler the other conspirators found not only an able pilot but also a man who seemed well versed in the lore of the smuggling business. On several occasions

Butler alluded to his prior experience in the field. He advised his employers to land the marijuana-laden plane at Lehigh Acres, an abandoned housing development near Tampa, Florida, and made other helpful suggestions with respect to the details of the illegal importation. He suggested reentry into the United States via the Bahama Islands where he claimed to have the customs officials bribed; he suggested that the other conspirators, when meeting the plane at the time and place of unloading, should be equipped with walkie-talkies for communication with the plane and should carry roofing nails to strew in the path of would-be pursuers.

Early Sunday morning, November 26, 1972, David Butler, John Geders and Jim Mahoney boarded Butler's rented plane and took off for Colombia, South America. On the return trip, after stopping at Inagua, the plane landed at the pre-arranged location near Tampa. The marijuana was transferred from the plane to the camper which left the landing site escorted by Randy Kilgore and Michael Fink. The caravan did not get far, however, because federal agents soon closed in. Steven Patrick, the driver of the camping trailer filled with marijuana, was immediately apprehended. Kilgore and Fink eluded immediate capture but were eventually arrested.

It seems that this well orchestrated scheme never really had a chance for success. The authorities had been informed of the group's plans far in advance by the pilot, David Butler. For his help in thwarting the smuggling attempt, the United States Customs Service agreed to permit Butler to retain the fee paid to him by the other conspirators.

The trial of the conspirators began on October 9, 1973.[1] Prior thereto Randy Kilgore and Steven Patrick pleaded guilty to a single conspiracy count and agreed to testify for the prosecution. Although David Butler was indicted along with the others, the government moved to dismiss the charges against him and the court granted the motion.

---

[1] Defendant James M. Mahoney was granted a severance and his case was tried separately.

As their primary defense at trial, appellants Geders and Fink argued that they had been entrapped by Butler, the government informer. Not only did he assist them in the furtherance of the importation scheme but, according to appellants, Butler induced them to commit the crime and had been paid to do so by the government who hired Butler as a sort of modern day bounty hunter. As a matter of fact, appellant Geders who was traveling in the plane with Butler on the trip from South America, claims that when the plane landed in Inagua before its reentry into the United States he was informed by a native that Butler appeared to be working with the police. After the plane was again in the air, Geders tried to persuade Butler to slow the plane down so that he and Mahoney could dump the marijuana into the sea. Butler ridiculed Geders' apprehensions and refused to permit anyone to unload the contraband until designated rendezvous was made.

The government, on the other hand, insisted that Butler had, at all times, merely assisted a plot which had begun before he entered the picture, and that anything he did which appeared to further the conspiracy was done to gain the confidence of the conspirators, a permissible objective in undercover police work.

The entrapment defense was presented to the jury which, nevertheless, returned a guilty verdict.

On this appeal appellants urge that fourteen separate errors were made in the court below with singly or together compel reversal of the convictions rendered by the jury. Many of the claims raised by the appellants are frivolous and warrant no discussion in this court. Efficiency demands that many of the remaining questions be treated in combination.

I.

Appellants have broadly attacked the district court's handling of the entrapment issue. They argue: that the government should have been prohibited from introducing unflattering evidence with respect to defendant Geders' reputation; that the defense was unfairly barred from

either ascertaining the events up which this reputation was based or introducing rebuttal character testimony after the prosecution had attacked defendant Geders' reputation; and that the government's participation in the smuggling enterprise through its avowed agent, David Butler, was so pervasive and so critical to the consummation of the crime that any prosecution of the appellants is unconscionable.

Throughout the trial appellants placed substantial reliance on an entrapment defense, *i.e.*, on the argument that they were reluctant participants in a criminal scheme engineered by a government agent who, for reasons of financial gain, had employed a "tremendous sales pitch" to overcome appellants' natural antipathy toward the commission of illegal acts.

[1-3] The purpose of the entrapment defense is to inhibit the use of pressure tactics by the government which cause the commission of an offense *by one who is not ordinarily disposed to commit it. See* Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1939). Naturally, the defense is not readily available to one who has evidenced an inclination to commit the type of offense with which he is charged. The government, therefore, once a defendant indicates his reliance on the entrapment defense, is permitted to tender evidence on the defendant's predisposition to commit the type of crime charged.

In this case the prosecution introduced Charles Hudson, a federal Narcotics Agent, who testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, Sheriff's Office and had thereby ascertained that defendant Geders had a reputation in his community as a drug smuggler and distributor. When the defense asked to see the files on which the witness' testimony was based or to be given reference to the specific events contained therein, it was rebuffed by the court which admonished the defense that it would be contrary to the rules of evidence for the prosecution to admit evidence of the

specific acts of defendant Geders which gave rise to his unsavory reputation.

[4] It has long been the rule in this Circuit that "reputation" or "character" evidence can be introduced by the government to rebut an entrapment defense. In fact, it has been specifically held that reputation evidence of the sort introduced in this trial is permissible.

> We have repeatedly held that once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents. Washington v. United States, 5 Cir., 1960, 275 F.2d 687; Rocha v. United States, 5 Cir., 1968, 401 F.2d 529; Thompson v. United States, 5 Cir., 1968, 403 F.2d 209. Moreover, in the case of Thompson v. United States, supra, this court specifically approved the use of reputation evidence in the form of testimony which the witness gleaned from the reports of a local police department.

United States v. Robinson, 446 F.2d 562, 563-564 (5th Cir. 1971).

[5-8] Not only was the trial court correct in admitting Agent Hudson's testimony, it was also well within established principles when it refused to permit the defense to question the witness about the specific events or activities of defendant Geders that gave rise to his adverse public image. Character reputation is established not by what one knows to be fact concerning another, but by what one has heard in the community about the person in question. Michelson v. United States, 335 U.S. 469, 482, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Thus, evidence of specific acts or conduct is not admissible to prove or disprove the reputation that a defendant holds in his community. Stewart v. United States, 70 App. D.C. 101, 104 F.2d 234 (1939).

Defendant Geders also argues that after this evidence with respect to his reputation was introduced by the prosecution, he was forbidden from rebutting it, or at least attenuating its impact, by introducing favorable reputation evidence. In fact, all that actually happened was that the court refused to grant the defendant a continuance, after Agent Hudson testified, so that he might search for character witnesses of his own. Defendant Geders argued that he needed the continuance because Agent Hudson's testimony was of an unexpected and surprising nature.

[9] It is well settled that once a defendant indicates his intention to rely on an intrapment defense, the prosecution can be expected to prove, if it can, that the defendant had a predisposition to commit the type of crime of which he stands accused. In this Circuit predisposition can be demonstrated by evidence that in his community the defendant had the reputation of one who committed a particular type of illegal act. Such evidence can by no stretch of the imagination be considered surprising or unexpected.

[10] In view of the prevailing case law, Agent Hudson's testimony did not introduce a new issue and the decision whether or not to grant a continuance to the defense under the circumstances was well within the discretion of the trial judge. He did not abuse that discretion.

Finally, appellants argue that, all things considered, the government's conduct was so unconscionable that the prosecution ought to be dismissed. In making this argument appellants put great emphasis on the testimony of John Geders who stated that on several occasions subsequent to leaving the Bahamas on their return to this country, he and co-defendant James Mahoney attempted to persuade Butler, the police agent and pilot, to slow down so that they might jettison their illicit cargo. According to Geders, Butler refused. Thus, as the defense tells it, the defendants, through Geders and Mahoney, had renounced their criminal enterprise and were attempting to dissassociate themselves from it.

[11] This is, of course, simply another way of saying that the defendants were entrapped by the government into the commission of the crimes charged. This argument had already been presented to the jury with

great force and we see no reason to interfere with the jury's evaluation of it—something that we could do only if we found that the jury had acted upon insufficient evidence or improper instructions. Neither ground is present here. The jury was undoubtedly persuaded by the uncontested fact that once the plane landed all the defendants present, including Geders, took part in transferring the cargo of marijuana to the waiting camper. This course of action seems completely inconsistent with defendant Geders' tale of renunciation and entrapment.

II.

Appellants' second major contention is that their defense efforts were hamstrung by the trial court's refusal to afford them its assistance in their attempts to obtain adequate pre-trial discovery. On numerous occasions the defendants asked the court to order various prosecution witnesses to submit themselves for deposition or, at the very least, to order these witnesses to discuss the facts of the case with the defense attorneys. Their pleas were consistently and, according to appellants, unfairly rebuffed. Appellants argue that the court's refusal to compel discovery left them "deaf, dumb and blind, and totally unable to formulate a proper defense . . ." and constituted a denial of fundamental fairness.

Appellants concede that there is no provision in the Federal Rules of Criminal Procedure, nor anywhere else, that specifically directs the trial court to order prosecution witnesses to give depositions to the defense or to submit themselves to pre-trial oral interrogation at the hands of defense counsel. Nevertheless, appellants argue that such action by the trial court, which is not inconsistent with those rules, is vital to the maintenance of procedural fairness as that principle is embodied in the Federal Constitution.

The constitutional status of the right of a criminal defendant to depose witnesses was settled, at least in this Circuit, in United States v. Hancock, 411 F.2d 1285, 1286-1287 (5th Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 81, 30 L.Ed.2d 63 (1971), where Chief Judge Brown wrote:

> Initially Hancock [the defendant] alleges error of constitutional dimensions by asserting that the Trial Court's denial of his motions for a list of government witnesses and a discovery order *for the purpose of taking their depositions* violated his rights under the Fifth and Sixth Amendments. . . . [W]ith the scope of discovery in criminal prosecutions narrower than it is in civil cases, Campbell v. Eastland, 5 Cir., 1962, 307 F.2d 478, 487, cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502, and in the absence of a rule which permits the taking of depositions of witnesses who will appear at the trial of a criminal case, we cannot say at this juncture that such a procedure has yet been elevated to a constitutional plane even though some states have seen fit to adopt it.

(Emphasis supplied).

Moreover, appellants' arguments notwithstanding, at least one Circuit Court of Appeals has held that Rule 16(b) of the Federal Rules of Criminal Procedure forbids a trial court from ordering those who will serve as witnesses for the prosecution to submit to defense deposition. *See* United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970).

[12] The general view, however, is that, with the exception of capital cases,[2] the question of the extent of defense discovery, at least that discovery which requires judicial assistance, is a matter within the discretion of the trial court. United States v. Richter, 488 F.2d 170, 175 (9th Cir. 1973). That discretion is not easily abused. "Denial of a motion to take a deposition is . . . reviewable on appeal from a judgment of conviction but defendant has a heavy burden to show an abuse of dis-

[2] 18 U.S.C. § 3432 requires that in capital cases the defendant be furnished a list of the names and addresses of the witnesses to be called by the government. The special status of pre-trial discovery in capital cases is discussed in Gregory v. United States, 125 U.S. App.D.C. 140, 369 F.2d 185 (1966).

cretion by the trial court, and no defendant thus far has prevailed on such an appeal." C. Wright, I Federal Practice and Procedure § 242, at 482 (1969).

[13] In exercising its discretion the trial court must weigh a variety of factors. For instance, it must balance the need of the accused for the depositions requested against the possibility that prospective witnesses might be harassed or intimidated as a result of their submission to the discovery process. United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), cert. denied, 405 U.S. 931, 92 S.Ct. 987, 30 L.Ed.2d 806 (1972).

[14] In this case there was clear evidence that the defendants were capable of harassment. One of the conspirators, who at trial testified as a witness for the prosecution, stated that appellant Geders carried a gun during the smuggling operation which he intended to use against David Butler if he sensed that Butler intended a double-cross. Furthermore, decision to testify for the prosecution might mark him or the members of his family for some act of revenge by the other conspirators. Under the circumstances we cannot say that the trial judge abused his discretion when he refused to order prosecution witnesses to submit themselves to defense deposition or to order them to discuss the case with counsel for the defense.

Finally, appellants claim that reversible error resulted from the court's refusal to interfere with the policy of the United States Customs Service which prohibits its agents from discussing the facts of pending cases with defense counsel without the permission of the United States Attorney.

[15] Appellants' argument is well taken to the extent that tradition forbids the prosecution from ordering its witnesses to refuse to answer pre-trial inquiries made by the defense. Canon 39 of the old Canons of Professional Ethics of the American Bar Association and Canon 10 of the Code of Trial Lawyers state that: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." However,

there is no evidence that the trial court failed to apply the law in this case. When defense counsel reported to the court that Federal Agents Buchanan and Christenberry refused to speak with the defense without the permission of the United States Attorney, Mr. Blasingame, the following colloquy ensued:

> Mr. Rhinehart: Right. I feel that at this time we should be able to talk to these witnesses, and that they should be instructed that they should talk to us.
>
> The Court: . . . You have got a right to talk to any witness who wants to talk to you. . . . You can talk to any of them. I will say this you can talk to anybody, period.
>
> When I say "period", I mean there is no limitation. *And, Mr. Blasingame, you just stay away.*

T. 910-912. (Emphasis supplied).

Appellants' contentions with respect to pre-trial discovery have been based, by and large, on some unfair characterizations of federal criminal procedure. Appellants have stated both to this court and to the court below that their inability to depose prosecution witnesses completely eviscerated their defense because they were never adequately informed of the charges against them and because they could not effectively employ the invaluable tool of cross-examination.

Appellants rightly point out that "[t]here is a tremendous difference in the words stating a crime in an indictment or an information, and the actual facts that a Defendant must meet at the trial of the cause." Appellants' Brief, at 8. However, they go too far when they conclude that this observation compels the taking of depositions. Appellants are ignoring the provision, made in Rule 7(f) of the Federal Rules of Criminal Procedure, for the issuance of a Bill of Particulars, a provision which was incorporated especially to close the information gap that may exist between the facts contained in the indictment and the factual issues which mature at trial.

Appellants also argue that pre-trial depositions are imperative if the defense is to utilize effectively its right to cross-examine the prosecution's witnesses. Again appellants ignore the fact that the Jencks Act, 18 U.S.C. § 3500, permits them to obtain from the prosecution all material statements made to it by its witnesses for purposes of defense cross-examination.

III.

[16] At one point during the trial, defendant Geders took the stand to testify in his own behalf. After being examined on direct until 4:55 pm, he was tendered for cross-examination. The prosecution moved for a recess at that time in order that cross-examination might be deferred until the following day. The court granted the motion and, after the jury had been withdrawn, it addressed defendant Geders, saying:

> Now, Mr. Geders, will you stand up. I direct you not to discuss your testimoy in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined.

Appellants claim that this order deprived defendant Geders of the assistance of counsel for a sixteen hour period at a crucial stage of the trial in violation of his Sixth Amendment rights. Appellants make no claim of actual prejudice accuring from this deprivation; they argue that they do not have to make such a showing and rely on the authority of United States v. Venuto, 182 F.2d 519 (3rd Cir. 1950), which provides:

> To deprive an accused defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing restriction of silence between accused and counsel during a trial recess. We reject the Government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution. . . . "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculation as to the amount of prejudice arising from its denial."

The United States Court of Appeals for the Second Circuit has more recently faced an identical fact situation, however, and it has required the defendant to make some showing of prejudice before the error of the trial court in forbidding lawyer/client consultation for some limited period rises to the status of reversible error.

> Leighton's [the defendant's] objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to counsel. . . . At no time during, before, or after the recess, did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the judge's ruling, but the objection appears to be an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss. . . .
>
> Leighton's reliance upon United States v. Venuto, 182 F.2d 519 (3 Cir. 1950), is misplaced. . . . Its [the ruling forbidding attorney/client communication] application to the defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right of effective assistance of counsel, and are convinced that there was none.

United States v. Leighton, 386 F.2d 822 (2d Cir. 1967).

Because, like the Second Circuit, "we can discern no actual harm . . . and are convinced that there was none," we must reject appellants' contention that defendant Ged-

ers' deprivation of the assistance of counsel constitutes reversible error.

We find all other assignments of error raised by appellants to be without merit. The judgment of the district court is therefore affirmed.

SUPRFME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5968

JOHN A. GEDERS, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted; limited to Question 1, presented by the petition which reads as follows:

> "1. Did the Court's order prohibiting defendant Geders and his attorney from conferring with each other during a sixteen hour period at a crucial stage of the trial deprive defendant Geders of his Sixth Amendment right to assistance of counsel?"

April 21, 1975

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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JOHN A. GEDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

BEST COPY AVAILABLE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial judge's order not to discuss his testimony with anyone during an overnight recess deprived him of the assistance of counsel and that hearsay testimony, tending to show his predisposition to commit the offenses with which he had been charged, was improperly adduced by the government to rebut his entrapment defense.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and co-defendant Michael Fink were convicted of conspiracy to import and illegal importation of marihuana into the United States, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 371, and possession of such marihuana, in violation of 21 U.S.C. 841(a)(1).[1/] Petitioner was sentenced to concurrent three-year terms of imprisonment on each count. The court of appeals affirmed (502 F. 2d 1; Pet. App.).

The evidence at trial showed that petitioner, co-defendant Fink and Randy Kilgore entered into an agreement in September 1972 to smuggle marihuana into the United States from South America. Petitioner agreed to provide a South American contact, Fink agreed to obtain financial backing for the trip and the purchase and Kilgore agreed to arrange for a pilot to fly the marihuana from South America to the United States. Each carried out his respective part of the conspiracy, arranging for the participation of several additional conspirators to assist in the undertaking. In November 1972, petitioner and the pilot flew in a rented plane to Columbia, South America, where they picked up a load of marihuana. They then returned, via the Bahamas, to Florida. Federal agents subsequently seized the marihuana and arrested all of the participants in the conspiracy (Pet. App. A3-A4).

1. Petitioner first contends that the trial court deprived him of his Sixth Amendment right to the assistance of counsel when it directed him not to discuss his testimony with anyone during an overnight recess.

Petitioner took the stand at trial in his own defense. Upon completion of his direct examination at 4:55 p.m., the government moved for a recess. Before declaring a recess to the following day, and out of the presence of the jury, the court instructed petitioner "not to discuss your testimony in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined" (Pet. App. A8).

1/ Co-defendant Fink has also petitioned for a writ of certiorari, contending that the government's use of hearsay to rebut his entrapment defense was improper. Fink's petition is presently pending before this Court. Fink v. United States, No. 74-820.

Petitioner did not, either before the court of appeals or in his petition to this Court, point to any actual prejudice caused by the disputed instruction -- contending instead that prejudice must be assumed whenever a defendant has been denied his constitutional right to the assistance of counsel (Pet. 4). It should be noted, however, that petitioner was represented by counsel throughout his trial. The court's instruction simply removed petitioner's opportunity to confer with his counsel between his direct and cross-examination concerning his answers to questions to be asked by the government. [2/] This opportunity arose only because direct examination of petitioner did not conclude until the end of the day, and cross-examination was consequently deferred to the following day. Any contention that a defendant has an absolute right to have a recess declared in order to confer with counsel, after he has begun testifying and before examination of him has been completed, would of course be unsupportable.

Even if it is assumed that the disputed instruction was error, we submit that the court of appeals nevertheless correctly refused to reverse petitioner's conviction on that basis. After having considered the factual circumstances underlying petitioner's contention in light of the decisions rendered in the only two cases that have involved a similar contention -- United States v. Venuto, 187 F. 2d 577 (C.A. 3), and United States v. Leighton, 386 F. 2d 822 (C.A. 2) -- the court of appeals

2/ The court accompanied its instruction in the present case with a promise to declare a recess after cross and redirect examination had been completed in order to permit consultation (Tr. 1153).

held that the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18. According to the court of appeals (Pet. App. A9):

> [b]ecause, like the Second Circuit, "we can discern no actual harm * * * and are convinced there was none," we must reject [petitioner's] contention that [the court's error] constitutes reversible error.

2. Petitioner also argues that hearsay testimony, tending to show his predisposition to commit the offenses with which he had been charged, was improperly adduced by the government to rebut his entrapment defense.

At trial, the government sought to rebut the entrapment defense relied upon by petitioner and co-defendant Fink by general reputation testimony tending to prove their predisposition to engage in narcotics trafficking. Charles Hudson, a federal narcotics agent, testified that he had talked to confidential informants and had examined intelligence files in the Hillsborough County, Florida, sheriff's office and had thereby ascertained that petitioner had a reputation in his community for drug smuggling and distributing. The court denied petitioner's request to see the files upon which Hudson's testimony was based, stating that under the circumstances it would have been contrary to the rules of evidence for the government or the defendants to submit evidence of specific past acts in an effort to prove or disprove the predisposition of the defendants to commit the offenses with which they had been charged (Pet. App. A5).

Testimony concerning a defendant's reputation in the community, such as that offered by the government in the present case, is admissible to rebut the defense of entrapment as part of the "appropriate and searching inquiry" authorized

by Sorrells v. United States, 287 U.S. 435, 451, and Sherman v. United States, 356 U.S. 369, 372-373. As stated by the court of appeals, "once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents" (Pet. App. A5). Moreover, the court's refusal to permit the defense to question Hudson about the specific events or activities that gave rise to petitioner's public image was well within the court's discretion. Character reputation is established by what one has heard in the community about the person in question, rather than by actual events or activities. See Michelson v. United States, 335 U.S. 469.

There is no conflict among the circuits on this issue. The cases upon which petitioner relies are inapplicable, since they deal with evidence of specific past acts offered to rebut an entrapment defense, rather than with evidence of general reputation, as in this case.

There was ample evidence, moreover, that despite the pilot's facilitating the present scheme, petitioner and his co-conspirators were fully predisposed to carry it out even without such aid. United States v. Russell, 411 U.S. 423, 435. The scheme commenced in 1972, when petitioner agreed to arrange for access to a supply of marihuana in South America (Tr. 56-57). Before a pilot was found, petitioner and Fink met with financial backers to discuss the cost of acquiring the marihuana and the eventual profit from distributing it (Tr. 61). Fink thereafter hired the pilot. As one witness testified (Tr. 309):

> the trip was going to go off, whether there was Mr. Butler [the pilot] or not * * * [T]hey were going to get a pilot, and if it was not Mr. Butler then they were going to have to * * * get one someplace else * * * John Geders [petitioner] made a few phone calls, when I was at his house, inquiring about a pilot * * *.

It is thus apparent that petitioner's criminal design was his own, not one implemented by the government. United States v. Russell, supra, 411 U.S. at 436.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

IN THE

Supreme Court of the United States

1974 TERM

No. 74-5968

JOHN A. GEDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

SEYMOUR L. HONIG, ESQ.
Suite 311, First National
Bank Building
215 Madison Street
Tampa, Florida 33602

Co-Counsel for Petitioner

RICHARD H. McINNIS, ESQ.
Suite 509, First National
Bank Building
215 Madison Street
Tampa, Florida 33602

Co-Counsel for Petitioner

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

Petitioner, John A. Geders, through his undersigned attorneys, respectfully submits his Brief to this Honorable Court, pursuant to Rule 40, Revised Rules of the Supreme Court of the United States, and would show unto the Court the following:

Reports Of Opinions Below

United States of America v. Michael J. Fink and John A. Geders, ____ F. 2d ____ (DC, MD of Fla. 1973); Trial Case No. 73-69-Cr-T-K

Fink and Geders v. United States of America, 502 F.2d 1 (5th Cir. 1974)

Grounds For Invoking Jurisdiction

The jurisdiction of this Honorable Court is invoked under:

18 U.S.C., Section 371
21 U.S.C., Section 841
21 U.S.C., Section 952
21 U.S.C., Section 955
21 U.S.C., Section 960
28 U.S.C., Section 1254(1)

There is apparently a direct conflict between the United States Courts of Appeals for the Second and Third Circuits regarding the narrow question presented for review herein with the United States Court of Appeals for the Fifth Circuit adopting (following) the law and rationale of the Second District in the case sub judice.

Constitutional Provision Involved

Sixth Amendment to the United States Constitution which guarantees to a defendant in a Federal criminal proceeding the right to have assistance of counsel for his defense.

Case Citations

Chapman v. State of California, 386 U.S. 125, 87 S.Ct. 824 (1967)

Fink and *Geders v. United States,* 502 F.2d 1 (5th Cir. 1974)

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680 (1942)

United States v. Leighton, 386 F. 2d 822 (2nd Cir. 1967)

United States v. Venuto, 182 F. 2d 519 (3rd Cir. 1950)

Question Presented For Review

WHETHER THE TRIAL COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STAGE OF THE TRIAL DEPRIVED DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

Statement of the Case

Petitioner, John A. Geders, was convicted in 1973 in United States District Court, Middle District of Florida, Tampa Division on three counts of a Grand Jury indictment charging him with:

(a) Conspiring to import approximately one thousand pounds of marihuana into the United States, in violation of 21 U.S.C., Section 952(a) and 18 U.S.C., Section 371;

(b) Illegal importation of said marihuana into the United States, in violation of 21 U.S.C., Section 952;

(c) Possession of marihuana in violation of 21 U.S.C., Section 841(a)(1).

Order, judgment and sentence were duly entered and imposed in this cause by the Honorable Ben Krentzman, Senior Judge of the United States District Court, Middle District of Florida, Tampa Division, in Case No. 73-69-Cr-T-K.

Petitioner thereafter timely filed his appeal and the aforesaid Judgment of Convictions was taken to the United States Court of Appeals for the Fifth Circuit in Appellate Case No. 73-3966. On October 7, 1974 the appellate court entered its judgment and opinion affirming the Judgment of Convictions of the District Court. (See Page ____ of Single Appendix re: the 5th Circuit Opinion.)

Petitioner thereafter unsuccessfully petitioned the appellate court for a re-hearing with that court entering its Order Denying Petition For Re-Hearing on December 6, 1974.

Subsequently, following Petitioner Geders' Motion, the appellate court recalled and stayed its Judgment previously issued as mandate pending the timely filing and disposition of a Petition For Writ of Certiorari to this Honorable Court and further ordered reinstatement of Petitioner's earlier appeal bond.

Following Application by Petitioner, this Honorable Court entered its Order on January 9, 1975 extending time to file his Petition For Writ of Certiorari up to and including February 4, 1975.

On April 21, 1975, following the timely filing of his Petition For Writ of Certiorari this Honorable Court granted review of his convictions by writ of certiorari

to the United States Court of Appeals for the Fifth Circuit.

On May 28, 1975 this Honorable Court granted a 15-day extension of time, until and including June 20, 1975 within which Petitioner's Brief must be filed.

WHETHER THE TRIAL COURT'S ORDER PROHIBITING DEFENDANT GEDERS AND HIS ATTORNEY FROM CONFERRING WITH EACH OTHER DURING A SIXTEEN HOUR PERIOD AT A CRUCIAL STAGE OF THE TRIAL DEPRIVED DEFENDANT GEDERS OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

Argument

It would appear the trial court fully apprehended the import of its Order to Defendant Geders *prohibiting his contact with or access to his attorney during a sixteen hour recess overnight between direct and cross examination of Geders.* It should be well noted that while the impression was created by the Government, in its Brief on appeal to the Fifth Circuit, that Geders was only ordered by Judge Krentzman to not consult with his attorney regarding his testimony, IN FACT, the trial judge ordered Defendant Geders and his counsel to remain TOTALLY INCOMMUNICADO to one another for a sixteen hour period during a critical stage of the trial. (The recess came during Defendant Geders' testimony, the last scheduled witness during the trial before the Government decided to offer rebuttal evidence by reason of Geders' testimony.)

The repressive tone for the incommunicado order sought by Prosecutor Blasingame should be carefully considered (T-1149):

MR. BLASINGAME:

> "Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorney–or anyone– about this case at all?"

The unmistakable tone and length and width and height and depth of the trial judge's order to Defendant Geders, *in response to the prosecutor's request*, placing Geders and his counsel totally incommunicado for a 16-hour period should be well noted (T-1153):

THE COURT:

> "Well, I don't have any questions, Mr. Rinehart (Geders' counsel), about what you–I think you are a disciplined man. I think you are trained in the law . . . but your client, as far as I know, has not had any legal training . . . and I don't know that he is subject to that same instruction–that he would understand it.
>
> *I think he would understand it if I told him just not to talk to you; and I just think that it is better that he not talk to you about anything.*" (emphasis added)

Finally, the trial court's question to counsel for Defendant Geders on the following morning (when the trial resumed) should be carefully noted in determining Judge Krentzman's intent regarding his all encompassing order to Defendant Geders (T-1164):

THE COURT:

> "You (Rinehart) have not talked with him (the Defendant Geders) of course, have you?"

MR. RINEHART:

> "No, I haven't."

The Fifth Circuit (along with all other Circuits except the Second and Third) had apparently not

previously addressed itself to this particular constitutional question and was forced to align itself with either the Second or Third Circuit, which Circuits held virtually opposite decisions and rationales on the question, to wit:

The Third Circuit held in *United States of America v. Venuto*, 182 F.2d 519 (3rd Cir. 1950) as follows at page 522:

> " . . . To deprive an accused defendant and his counsel of the right to consult with each other during an eighteen hour court recess was most certainly deprivation of the defendant's constitutional right to consult counsel at all stages of the proceeding. We can find no justification for imposing a restriction of silence between the accused and counsel during a trial recess. We reject the Government's contention that the defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a Federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client, but, as stated in Glasser v. United States, supra, 315 U.S. at page 467:
>
> 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'
>
> By restricting the right of consultation between this Defendant and his counsel during court recess, Defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the Constitution. His objection on this ground and his motion for mis-trial directed to the trial court were well founded. Accordingly, the conviction must be reversed and a new trial granted."

In contrast, the Second Circuit held in *United States of America v. Leighton*, 386 F.2d 822 (2nd Cir. 1967) as follows at page 823:

> "Leighton's objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to counsel. But Leighton was represented by retained counsel during the entire trial. What is actually at issue is the question of the effective assistance of counsel. At no time during, before, or after the recess, did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the judge's ruling, but the objection appears to us an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss. Compare Krull v. United States, 240 F.2d 122 (5 Cir.), cert denied 353 U.S. 915, 77 S.Ct. 764, 1 L. Ed. 2d 668 (1957). We conclude that the Government has established beyond a reasonable doubt that the appellant's right to the effective assistance of counsel was not impaired by the ruling of the trial court. See Chapman v. State of California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).
>
> "Leighton's reliance upon *United States v. Venuto*, 182 F.2d 519 (3 Cir. 1950), is misplaced. That case involved a series of rulings barring communication between a defendant and his attorney in a four-day bank deposit reconstruction income tax trial involving voluminous records. The harm done by the ruling in those circumstances is self-evident. In the case before us, only one eighty-five minute luncheon recess is involved. The ruling in the instant case barring communication between the

> defendant and his counsel during the recess between direct and cross examination was also applied to every other witness who testified at the trial. The application of this ruling to others than the defendant is not in issue. Its application to the defendant was quite plainly uncalled for, and we are unable to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right to effective assistance of counsel, and are convinced that there was none."

The Fifth Circuit in the case sub judice, after examining both in its opinion, rejected the law and rationale of *Venuto, supra* in favor of the law and rationale of *Leighton, supra*, stating at page 272 and 273 of its opinion:

> "The United States Court of Appeals for the Second Circuit has more recently faced an identical fact situation, however, and it has required the defendant to make some showing of prejudice before the error of the trial court in forbidding lawyer/client consultation for some limited period rises to the status of reversible error . . . "
>
> " . . . Because, like the Second Circuit, we can discern no actual harm . . . and are convinced that there was none, we must reject appellant's contention that defendant Geders' deprivation of the assistance of counsel constitutes reversible error."

The Fifth Circuit thus aligned itself with the Second Circuit, notwithstanding two United States Supreme Court cases, whose rationales can reasonably be interpreted to include the rule of law that denial to a Defendant of access to counsel during a crucial state of

his criminal trial proceeding is, *per se*, reversible error; i.e., that the denial is deprivation of the defendant's right to assistance of counsel in his defense, as guaranteed by the Sixth Amendment to the United States Constitution. The rationales of these cases is the denial is such a fundamental deprivation of a Federal constitutional right as to not require any showing of prejudice or "actual harm," to wit:

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 at page 467:

> " . . . To determine the precise degree of prejudice sustained by Glasser as a result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial.*" (emphasis added)

Earlier in the opinion at page 467, the Supreme Court stated:

> "There is yet another consideration. Glasser *wished the benefit of the undivided assistance of counsel* of his own choice. We think that such a desire on the part of an accused should be respected. . . ." (emphasis added)

Some Thoughts on *Venuto* and *Leighton*

The factual situation in *Venuto, supra*, was strikingly similar to the factual situation in the instant case regarding the incommunicado orders by the respective trial judges; in the former for an 18-hour overnight recess between direct and cross examination of the Defendant and in the instant case for a 16-hour overnight recess between direct and cross examination of the Defendant. In *Venuto* the trial judge stated at page 521:

> "I would like to say to counsel, I do not want to keep this man in custody overnight–he is now committed for cross-examination so *he will not discuss this case with anybody*. Otherwise, I will have to commit him." (emphasis added)

The opinion continues to state at page 521:

> "In the ensuing discussion, similar and more explicit directions were given by the trial judge to the effect that Defendant and his counsel were required to bind themselves not to consult together during this eighteen hour overnight recess at this crucial point of the trial or the court would revoke Defendant's bail and commit him to jail incommunicado so that no consultation would be possible."

It will be recalled that in the instant case the trial judge instructed Defendant Geders (T-1153):

> " . . . I think he (the Defendant) would understand ti [sic] if I told him just not to talk to you (counsel); and I just that it is better that *he not talk to you about anything*." (emphasis added)

The intention of these orders is plainly more than restricting the Defendant and his attorney from talking about testimony offered by the Defendant on direct examination or to be offered on cross-examination to the questions of presecution. The intentions of the trial judges were rather to lower thick impenetrable veils of silence between the Defendants and their attorneys for 18 and 16 hours, respectively, regarding all aspects of the trial proceedings, past, present and future; i.e., they were incommunicado orders absolutely barring consultation between Defendants and their attorneys during critical stages of their trial proceedings.

In contrast, in *Leighton* the appellate court was only considering an incommunicado order imposed by the trial judge between direct and cross examination of the Defendant during a luncheon recess covering less than an hour and a half. Even though the Second District conceded that the incommunicado order imposed on Defendant Leighton was "quite plainly uncalled for, and we are unable to understand why it was sought or made as to him," (p. 823), still that appellate court apparently "indulged in nice calculations as to the amount of prejudice arising from its denial" (right to counsel), and found no prejudice or "actual harm" to Defendant's right to assistance of counsel in his defense. In considering what is actually at issue, as stated by the Second District in *Leighton* at page 823, the question of the "effective assistance of counsel," one wonders how this appellate court would rule on the instant trial court's incommunicado order that imposed a heavy veil of silence between the Defendant and his counsel during an overnight recess of SIXTEEN HOURS, *regarding all matters at trial?* It is conceivable that even this appellate court, while "indulging in nice calculations as to the amount of prejudice arising from its denial," may very well have long pondered and even found a denial of "effective assistance of counsel" in the trial proceeding and further found that the Defendant suffered prejudice and "actual harm" without any "affirmative showing" of same.

Several Other Observations

There is room for meaningful speculation as to why any trial judge would impose an across-the-board

incommunicado order of 16 hours duration upon the sole testifying Defendant and his attorney in the recess between his direct and cross-examination testimony. Why, for example, didn't the trial judge only limit the incommunicado order to no discussion regarding the Defendant's testimony? Would not an admonition to the Defendant and his counsel to not discuss Defendant's testimony be just as effective as limiting or admonitory orders and instructions freely given by the Court to other witnesses and the jury regarding matters of law and fact at other recesses or interruptions during the course of the trial?

There was, of course, no counterpart admonition against the prosecuting attorneys continuing on at full speed overnight in preparing the Government's cross-examination of Geders, including consultation with the case agent who was present during the direct examination of the Defendant, preparing argument against Defendant's predictable motion for judgment of acquittal following Geders' testimony (Geders was the last witness scheduled to testify before the Government decided to offer rebuttal testimony by reason of Geders' testimony), etc.

Moreover it should not be overlooked that the "problem" of Defendant's communication with his counsel during the 16-hour recess arose by reason of the *prosecution's request* for the recess between direct and cross examination and the *prosecution's request* for the total incommunicado order to be placed heavily upon Defendant Geders and his attorney.

The ultimate issue before this Honorable Court is whether the trial judge *per se* denied to Defendant Geders in the instant criminal proceeding his Sixth Amendment right to assistance of counsel when he ordered the Defendant and his counsel to remain totally

incommunicado for a 16-hour period of time at a crucial stage of his trial or whether the Defendant must affirmatively establish prejudice or "actual harm" arising from the veil of silence imposed by the trial court between a Defendant and his attorney during the trial proceeding?

It is the contention of Petitioner Geders that, as stated in *Venuto, supra:*

> "We reject the Government contention that Defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution. Not only would this require them to disclose what would have been privileged communication between attorney and client but, as stated in Glasser v. United States, Supra, 315 U.S. at page 76, 62 S.Ct. at page 467: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." By restricting the right of consultation between the Defendant and his counsel during court recesses Defendant was denied the right to have the assistance of counsel for his defense, as guaranteed by the Sixth Amendment to the U.S. Constitution. . ."

Conclusion and Prayer

For the reasons hereinbefore cited, Petitioner, John A. Geders, respectfully prays that this Honorable Court resolve the conflict now existing between the United States Court of Appeals for the Second and Third Circuits on the question presented in this cause for review by adopting the law and rationale of the Third Circuit; and further, respectfully prays that this Honorable Court reverse the Judgment of Convictions

entered against him in United States District Court, Middle District of Florida, Tampa Division, as affirmed by the United States Court of Appeals for the Fifth Circuit; and, in the alternative, to reverse and remand for new trial as to Petitioner, John A. Geders.

Respectfully Submitted,

SEYMOUR L. HONIG, ESQ.
Suite 311, First National
Bank Building
215 Madison Street
Tampa, Florida (33602)

Co-Counsel for Petitioner

RICHARD H. McINNIS, ESQ.
Suite 509, First National
Bank Building
215 Madison Street
Tampa, Florida (33602)

Co-Counsel for Petitioner

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No. 74-5968

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN A. GEDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JOHN P. RUPP,
Assistant to the Solicitor General,

SIDNEY M. GLAZER,
VICTOR STONE,
LAUREN S. KAHN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 502 F. 2d 1 (App. 24-40).[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on October 7, 1974. A petition for

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[1] "Tr." refers to the transcript of the proceedings in the district court involving petitioner and co-defendant Fink. "App." refers to the Joint Appendix filed with this Court.

rehearing was denied on December 6, 1974 (Pet. App. C). On January 9, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 4, 1975. The petition was filed on that date, and was granted on April 21, 1975 (App. 41). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's limitation of discussions between petitioner and his counsel, during an overnight recess after completion of petitioner's direct examination, to a conference to discuss trial strategy and a prohibition of discussion of petitioner's testimony, requires the reversal of petitioner's conviction, where there has been no showing that the limitation prejudiced petitioner.[2]

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner

[2] This is a restatement of the first question presented, to which the Court limited the grant of the petition.

and co-defendant Michael Fink were convicted of conspiracy to import and illegal importation of marijuana into the United States, in violation of 18 U.S.C. 371 and 21 U.S.C. 952(a), and possession of marijuana, in violation of 21 U.S.C. 841(a)(1).[3] Petitioner was sentenced to concurrent three-year terms of imprisonment (App. 4-5). The court of appeals affirmed (502 F. 2d 1; App. 24-40).

1. The evidence showed that petitioner and co-defendant Fink conspired with seven other persons to smuggle approximately 1,000 pounds of marijuana into the United States from Columbia. The conspiracy began in early September 1972, when petitioner, Fink and William Rand ("Randy") Kilgore[4] met and agreed jointly to undertake such a venture (Tr. 56-58, 255-257, 264-267). Petitioner promised to secure access to a supply of marijuana in South America, Fink promised to find the necessary financial backing, and Kilgore agreed to make arrangements with a pilot able and willing surreptitiously to fly a large quantity of marijuana into the United States (Tr. 57-59).

Fink experienced little difficulty in convincing James Mahoney and Tom Waddington to join the venture and to supply the necessary capital (Tr. 61-

[3] The petition for a writ of certiorari filed by co-defendant Fink was denied on April 14, 1975. *Fink* v. *United States*, No. 74-820.

[4] Kilgore testified at trial for the government after having pleaded guilty to conspiracy to import marijuana (App. 29; Tr. 123-124).

62, 66-69).[4] Kilgore had somewhat more trouble finding a pilot, but after a few false starts he located David Butler through a contact in New York (Tr. 64). Butler had access to an airplane, and he agreed to make a round-trip flight to Colombia for a $10,000 fee plus expenses and one hundred pounds of marijuana (Tr. 65, 115). Three additional persons also joined the venture as it took shape, agreeing to participate in the transportation and distribution of the marijuana after it had been brought to the United States (Tr. 77-79, 247-250, 265-267).

At some point prior to the time Butler was scheduled to fly to Colombia to pick up the marijuana, Kilgore developed reservations concerning Butler's allegiance. He therefore called his contact in New York and asked "what the story [was] on" Butler. Kilgore was informed that Butler "wasn't the heat" (that is, a law enforcement officer) but that he had "ripped off some people for $10,000" by taking their money and not delivering the marijuana he had agreed to transport. On the basis of this information, petitioner, Kilgore and Fink decided that petitioner would carry Fink's revolver on the flight from Colombia "to take care of the pilot if anything went wrong" (Tr. 70-71).[6]

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[5] Mahoney was tried separately, and was convicted of the same offense as petitioner. Waddington died prior to petitioner's trial (App. 29; Tr. 1268).

[6] Petitioner was also charged with illegal possession of Fink's revolver, but the charge was dismissed at trial, with the government's acquiescence, because of the absence of any evidence that petitioner actually had carried the weapon during the smuggling operation (Tr. 670-671).

On November 26, 1972, petitioner, Butler and Mahoney boarded the airplane Butler had rented and took off for Colombia (Tr. 72, 283). On the return, Butler landed the plane at an abandoned housing project located near Tampa, Florida (Tr. 73-74, 276-279). The conspirators thereupon transferred the marijuana from the plane to a camper truck (Tr. 74, 279). The camper truck, escorted by Kilgore, Fink and Waddington, was then driven from the site and the plane, occupied by Butler, petitioner and Mahoney, took off for Tampa (Tr. 74-75, 280-282).

Kilgore's reservations about Butler proved to be well founded. Approximately two weeks prior to the flight to Colombia to pick up the marijuana, Butler had informed the United States Customs Service of the smuggling conspiracy (Tr. 1049).[7] On the basis of Butler's tip, agents of the Customs Service maintained a lookout at the appointed landing site, and they observed the transfer of the marijuana from the plane to the camper truck and the subsequent dispersion of the conspirators. All of the conspira-

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[7] In return for this information, Butler was permitted to retain the $10,000 he had been paid for making the flight (Tr. 1052). Butler was later charged with illegal possession of marijuana, however, after it was discovered that he had also kept and sold fifty pounds of the marijuana he had transported from Columbia to the United States (Tr. 1058). This charge was dismissed at the beginning of petitioner's trial (App. 29).

tors were arrested shortly thereafter (Tr. 280-281, 504-507, 529-530, 536-537, 577-580).

2. Petitioner's testimony at trial was that he had been entrapped into committing the offenses. He testified that his frequent conversations about marijuana smuggling with Kilgore and a friend living in Colombia, whom he visited in October 1972 and from whom the marijuana eventually was obtained, were initiated by those persons rather than by him (Tr. 1266-1271). He also testified that he had not actually joined the conspiracy until induced to do so by Butler (Tr. 1283-1284).

In response to questions obviously designed to establish his predisposition to commit the offenses charged, petitioner admitted on cross-examination that he had been aware in early 1972 that his South American business partner in a store selling stereo equipment was a big dealer in narcotics (Tr. 1232-1233). He also admitted that on two occasions he had carried approximately $100,000 in cash to New York for his business partner in order to exchange the cash for bills of large denominations (Tr. 1263-1265).

In rebuttal to petitioner's testimony, Kilgore testified for the government that in November 1972 petitioner had given him 8 to 10 grams of cocaine to sell on consignment and that on two occasions, between September and November 26, 1972, he had sold heroin to petitioner (Tr. 1381-1383).

2. At the conclusion of the direct examination of petitioner, the court noted that it was 4:55 p.m. and

asked counsel for co-defendant Fink and the Assistant United States Attorney whether they wished to continue or to have a recess declared to the following day. Fink's attorney stated that he did not intend to ask petitioner any questions; the Assistant United States Attorney stated that he preferred to defer his cross-examination of petitioner until the next morning (Tr. 1147-1148; App. 16-17). The court thereupon excused the jury and, pursuant to a request by the government, instructed petitioner "not to discuss [his] testimony in this case with anyone until [he returned the next morning] at 9:30 for the purpose of being cross-examined" (Tr. 1153; App. 20).

When petitioner's attorney objected to this instruction, the court noted that but for the fortuity of the recess there would have been no opportunity for consultation prior to the cross-examination of petitioner. The court asked petitioner's attorney whether petitioner would have been entitled to a recess in order to permit consultation prior to his being tendered for cross-examination. Petitioner's attorney responded that petitioner did not have a right to a recess for that purpose. He also stated that even though he had no right "to coach [petitioner] as to what he may say on cross-examination or how to answer questions," he had a right under the circumstances to confer with petitioner concerning such things as trial strategy and the order of witnesses (Tr. 1149-1152; App. 17-19).

The court agreed, but stated that because it seemed unlikely that petitioner would be able to con-

form to the court's and counsel's mutual understanding of the matters that properly could be discussed prior to cross-examination, he would grant petitioner an immediate opportunity to confer with his attorney concerning trial strategy but would prohibit all further overnight conversation (Tr. 1152-1153; App. 19). The court also assured petitioner's attorney that after re-direct examination of petitioner had been concluded he would be given whatever time he felt was needed to confer with petitioner (Tr. 1153; App. 19).[a]

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[a] In announcing its ruling on this point, the court stated in pertinent part (Tr. 1152-1153; App. 19):

> [Y]our client, as far as I know, has not had any legal training; and I don't know anything about him other than what I have heard here today. And I don't know that he is subject to that same instruction—that he would understand it.
>
> I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything.
>
> * * * *
>
> Let's put it this way. You ask him right now if he thinks there are any witnesses you ought to call during the evening. If anything comes up after he has been cross-examined, and after you have had an opportunity for redirect, we would have a recess and you would have all the time you need to talk to him about strategies or anything else. We will take the rest of this month, if necessary, to give you an opportunity and him an opportunity for a fair trial. But we are not going to let strategy take the place of this situation.

The record does not disclose whether petitioner took advantage of the opportunity to have an immediate conference with his attorney.

When the court reconvened the following morning, petitioner's attorney requested that he be permitted to reopen direct examination of petitioner. The court granted this request (Tr. 1164; App. 20-21). After the Assistant United States Attorney had completed his cross-examination, petitioner's attorney objected to a proposed instruction prohibiting him from consulting with petitioner during a luncheon recess immediately prior to the beginning of re-direct examination. Again, petitioner's attorney conceded that he would not have had an opportunity to confer with petitioner but for the fortuity of the recess. The court permitted petitioner and his attorney to confer during the recess, however, after having observed again that petitioner did not have an absolute right to confer with his attorney during the period of his examination (Tr. 1335-1336; App. 22-23).

3. In affirming petitioner's conviction, the court of appeals noted (App. 38) that petitioner had not attempted to show that the instruction prohibiting consultation during the bulk of the recess between his direct and cross-examination had prejudiced his right to a fair trial. Relying upon the Second Circuit's decision in *United States* v. *Leighton*, 386 F. 2d 822, certiorari denied, 390 U.S. 1025, the court of appeals held that the disputed instruction did not rise to the level of reversible error "[b]ecause * * * 'we can discern no actual harm * * * and are convinced that there was none' " (App. 39-40).

SUMMARY OF ARGUMENT

The claim made in this case is that a particular restriction upon consultation between petitioner and his attorney during trial requires, without more, the reversal of petitioner's conviction. Petitioner does not contend that he suffered actual prejudice as a result of the restriction and, as we shall demonstrate, the record of this case affords no basis for assuming prejudice.

Petitioner's contention that he is nonetheless entitled to have his conviction reversed fundamentally misconceives the nature of the adversary factfinding process constitutionalized in the Sixth and Fourteenth Amendments. More specifically, it ignores the fact that once a person has been accused of a criminal offense he becomes subject to a variety of restrictions that necessarily limit the opportunities he otherwise would have to consult with his attorney and to assist generally in the preparation of his defense. The range of these concededly valid restrictions increases significantly once the trial has begun, and is greatest when the defendant has elected to testify at trial and is on the stand.

The narrow limitation the district court imposed upon petitioner's consultation with counsel is not unlike the numerous restrictions to which all criminal defendants are necessarily subject. Consequently, we submit that a finding of prejudice *per se* is inappropriate in this case. We submit further that since petitioner has not pointed to any actual prejudice

that he suffered as a result of the restriction at issue here, the court of appeals properly affirmed his conviction.

ARGUMENT

THE DISTRICT COURT'S LIMITATION OF DISCUSSIONS BETWEEN PETITIONER AND HIS COUNSEL, DURING THE OVERNIGHT RECESS FOLLOWING COMPLETION OF PETITIONER'S DIRECT TESTIMONY, TO A CONFERENCE TO DISCUSS TRIAL STRATEGY AND PROHIBITION OF DISCUSSION OF PETITIONER'S TESTIMONY, DOES NOT REQUIRE THE REVERSAL OF PETITIONER'S CONVICTION

This case presents a narrow question involving the application of the Sixth Amendment's right to assistance of counsel. Petitioner had counsel at all critical stages of the proceedings against him, and there is no claim that the assistance his counsel furnished him was inadequate. The issue is whether the district court's limitation of petitioner's consultation with counsel, during an overnight recess between petitioner's direct testimony and cross-examination, to a discussion at the beginning of the recess of trial strategy and the prohibition of discussion of petitioner's direct testimony, automatically requires the reversal of petitioner's conviction, even though petitioner has not shown that he suffered any prejudice from the limitation.

In some situations, limitation of the right to counsel has been held without more to require reversal of a conviction. See *infra*, pp. 13-14. In other contexts, however, the limitation has either been held to be proper or the validity of the conviction has turned

upon whether the limitation was prejudicial or merely harmless error. See *infra*, pp. 14-22. As we show below, the limitation in this case is of the kind for which the doctrine of harmless error is appropriate; under that doctrine the court of appeals properly upheld petitioner's conviction because petitioner did not show that the limitation upon consultation with his counsel denied him a fair trial or otherwise prejudiced him.

A. The narrow limitation the district court imposed upon petitioner's consultation with counsel does not call for reversal of petitioner's conviction in the absence of a showing of prejudice.

The cases in which this Court has held that violations of constitutional rights automatically require reversal of a conviction without any inquiry into whether the violations were prejudicial to the defendant are of two categories. The first category has involved the deprivation of a right either so basic to a fair trial or with respect to which resulting prejudice—even if present—would have been so difficult to demonstrate, that the existence of prejudice could not reasonably or fairly be denied.[9] The second category has involved such gross official misconduct

[9] Examples include cases in which jurors have been exposed to publicity highly adverse to the defendant (*e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-352) and cases in which the defendant's conviction may have rested on a constitutionally-impermissible ground (*e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 292).

that a conviction tainted by that misconduct should not be permitted to stand.[10]

Where there has been an actual denial of counsel —either totally or at a particular critical stage of the proceedings—that ordinarily requires a reversal of a conviction without regard to whether prejudice has been shown. *E.g.*, *Argersinger* v. *Hamlin*, 407 U.S. 25; *Gideon* v. *Wainwright*, 372 U.S. 335; *Johnson* v. *Zerbst*, 304 U.S. 458; *Powell* v. *Alabama*, 287 U.S. 45. Compare *Milton* v. *Wainwright*, 407 U.S. 371, and *United States* v. *Wade*, 388 U.S. 218, with *White* v. *Maryland*, 373 U.S. 59, and *Hamilton* v. *Alabama*, 368 U.S. 52. The basic premise underlying these decisions is that the assistance of counsel is so basic to a fair trial that actual prejudice need not be demonstrated, but will be assumed, if the denial of counsel was both absolute and occurred at one or more stages of the proceedings potentially critical to a successful defense. As stated in *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 344:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. * * * That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread be-

[10] Examples include egregious prosecutorial misconduct (cf. *Berger* v. *United States*, 295 U.S. 78, 84-89) and use of an involuntary confession (*e.g.*, *Lynumn* v. *Illinois*, 372 U.S. 528, 537; *Spano* v. *New York*, 360 U.S. 315, 324).

lief that lawyers in criminal courts are necessities, not luxuries. * * *

Where, however, the alleged denial of the right to counsel is based upon limitations on consultation between the defendant and counsel, different policy considerations are involved. As developed below, the very nature of the criminal process unavoidably imposes some restrictions upon a defendant's access to counsel and his participation with counsel in preparing and handling his case. Petitioner's claim that he is entitled to the reversal of his conviction solely on the basis of the limitation the district court imposed upon the discussion of his testimony with his counsel during the overnight recess interrupting his examination, without showing that the limitation prejudiced the defense of his case, ignores "the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments" (*Herring* v. *New York*, No. 73-6587, decided June 30, 1975 (slip op., p. 5).[11]

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[11] The instruction to petitioner that he was not to discuss his testimony with his counsel during the overnight recess between his direct and cross-examination was consistent with the court's efforts throughout the trial to prevent the possible tailoring of testimony. Other witnesses generally were not permitted to be present in the courtroom except when they were testifying, and they were instructed not to discuss the case with anyone outside the courtroom, other than attorneys representing the government or the defendants (Tr. 8). Whenever the testimony of a witness was interrupted by a recess, the court routinely advised the witness not to speak with anyone during the recess (Tr. 124, 177, 318, 435, 471, 999; App. 6-9, 11-12, 13). At the request of petitioner's attorney,

When a person is formally charged with crime, the law frequently subjects him to restrictions which inevitably somewhat limit his ability to consult with counsel and to prepare his defense. If the defendant is incarcerated prior to trial, his confinement necessarily limits to some extent consultation with counsel and prevents him from himself seeking out witnesses or developing evidence. When the defendant is released on bail or on his own recognizance, he frequently is subject to travel or other restrictions. Although these restrictions may somewhat limit the defendant's ability to consult with counsel, they have been consistently upheld as long as they have not precluded adequate pretrial preparation and have been justified by other recognized policies, such as the need to maintain prison security and order, and to ensure the presence of the defendant at trial.[12]

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even the government's chief investigatory agent was prohibited not only from participating in but also from attending conferences with other government witnesses (Tr. 840-841; App. 12).

In contrast to the limitations the court placed upon consultation between witnesses and attorneys during a witness' testimony, the court freely granted recesses when requested (Tr. 1041-1042, 1076-1077; App. 13-14, 16) and repeatedly granted defense motions to reopen the examination of witnesses that had been concluded before the recesses (Tr. 180-184, 1163-1164; App. 20-21).

[12] See, *e.g.*, *Via* v. *Cliff*, 470 F.2d 271 (C.A. 3) (in order to establish an infringement of his constitutional right to counsel, the plaintiff was required to prove in an action under 42 U.S.C. 1983 that the restrictions placed by prison officials upon conferences with his attorney were either wrongfully motivated

In the criminal trial itself, there are also significant restrictions upon the defendant's right to consult with counsel and, indeed, upon counsel's activities themselves. As this Court noted in *Quercia* v. *United States*, 289 U.S. 466, 469, "[i]n a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the pur-

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or unnecessary to maintain prison security and order); *United States* v. *Gordon*, 455 F.2d 398 (C.A. 8) (the defendant was not deprived of the effective assistance of counsel because his attorney was denied admittance to the jail in which he was incarcerated on the day before trial, since the trial court permitted adequate time for consultation prior to trial and the defendant failed to establish prejudice); *United States* v. *Hughes*, 429 F.2d 1293 (C.A. 10) (transfer of the defendant from the place of trial to a federal prison where he was allegedly unable to confer with his attorney did not deprive the defendant of the effective assistance of counsel on appeal, since the defendant was not transferred until ten days after the verdict was returned and he failed to show that his attorney was incompetent or lacked diligence); *Krull* v. *United States*, 240 F.2d 122 (C.A. 5), certiorari denied, 353 U.S. 915 (where the defense was not hampered by the presence of an officer at conferences in prison between the defendant and his attorney, there was no denial of the defendant's right to the assistance of counsel); *United States* v. *White*, 295 F. Supp. 893 (N.D. Ga.) (the fact that the defendant was forced to confer with his attorney in a crowded visiting room was not grounds for dismissal of indictment); *Smith* v. *Peyton*, 276 F. Supp. 275 (W.D. Va.) (the fact that a prison officer was present in the conference room in which the defendant conferred with his attorney before trial did not deprive him of the effective assistance of counsel, since the official was stationed there as a precautionary measure and his presence in no way interfered with the conferences or with his attorney's representation); see also *Fuller* v. *United States*, 407 F.2d 1199, 1212-1213 (C.A. D.C.), certiorari denied, 393 U.S. 1120; *Negrich* v. *Hohn*, 379 F.2d 213, 215 (C.A. 3).

pose of assuring its proper conduct * * *." This power to govern generally encompasses setting the order of proof (*e.g.*, *Thiede* v. *Utah Territory*, 159 U.S. 510, 519; *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060) and taking necessary steps efficaciously to move the trial to conclusion.

There will be occasions, for example, when the trial court may find it necessary to limit the timing and length of conferences between a defendant and his attorney. The defendant has no absolute right to a recess in the trial to enable him to consult with counsel. Requests for a trial-recess are addressed to the court's discretion, and an important factor in evaluating such a request to permit consultation is the countervailing consideration that the jury's ultimate understanding of the evidence is generally facilitated by avoiding unnecessary interruptions in its introduction. See, *e.g.*, *Tasby* v. *United States*, 451 F. 2d 394, 399 (C.A. 8); *United States* v. *Perchalla*, 407 F. 2d 821, 822 (C.A. 4); *Juarez-Flores* v. *United States*, 394 F. 2d 161, 163 (C.A. 5), certiorari denied, 393 U.S. 942; *Galbraith* v. *United States*, 387 F. 2d 617, 619 (C.A. 10).

When a defendant takes the stand, defense requests for a recess to permit consultation during his testimony invoke a range of considerations not invoked by similar requests made while a non-party witness is testifying. The defendant in a criminal case has a largely unlimited right "to remain silent unless he chooses to speak in the unfettered exercise of his own

will, and to suffer no penalty * * * for such silence." *Malloy* v. *Hogan*, 378 U.S. 1, 8; cf. *Griffin* v. *California*, 380 U.S. 609. But once he has chosen to testify, he is subject to the same risks as any other witness—risks to which he would not be subject simply as a defendant.[13] He also opens the door to a searching cross-examination on matters covered in his direct examination. See, *e.g.*, *Brown* v. *United States*, 356 U.S. 148; *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316; see also *McGautha* v. *California*, 402 U.S. 183, 213-215.

This distinction between the role of a defendant and a witness/defendant is deeply rooted in the nature of the criminal trial as an adversary factfinding process. The defendant who elects to testify at trial puts his credibility in issue to the same extent as any other witness. Like any other witness, he has an affirmative obligation "to speak truthfully and accurately." *Harris* v. *New York*, 401 U.S. 222, 225; see also *United States* v. *Knox*, 396 U.S. 77; cf. *Dennis* v. *United States*, 384 U.S. 855. But the truthfulness and accuracy of his testimony requires that it be put to the acid test of cross-examination.

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[13] For example, although admissions secured from a defendant in violation of *Miranda* v. *Arizona*, 384 U.S. 436, may not be introduced by the prosecution during its case-in-chief, the witness/defendant runs a risk that the prosecution will use such admissions for impeachment purposes. *Harris* v. *New York*, 401 U.S. 222. Similarly, the defendant who testifies at trial may be impeached by proof of prior convictions. *Spencer* v. *Texas*, 385 U.S. 554, 561; cf. *Michelson* v. *United States*, 335 U.S. 469.

The importance of cross-examination to the adversary factfinding process has long been recognized. As this Court noted in *Davis* v. *Alaska*, 415 U.S. 308, 316, for example, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Indeed, "[t]here are few subjects * * * upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405; see also *California* v. *Green*, 399 U.S. 149, 158; *Greene* v. *McElroy*, 360 U.S. 474, 496.

Effective cross-examination requires that the witness personally and immediately answer questions without consulting with third parties. As pointed out in *Davis* v. *Alaska*, *supra*, 415 U.S. at 315-316 (quoting 5 Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)):

> The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

A defendant who takes the stand is required—like all other witnesses—to give immediate and personal responses to questions put to him on cross-examination, without the opportunity to consult with counsel.

As this Court stated in *Brown* v. *United States*, 356 U.S. 148, 154, 155, the testimony of a defendant is not "freed from the antiseptic test of the adversary process" but may be probed and "assailed like that of any other witness." See also *Bronston* v. *United States*, 409 U.S. 352, 359; *Fitzpatrick* v. *United States*, *supra*, 178 U.S. at 315.

The fact that a defendant has no right to interrupt his testimony to consult with his attorney does not deny him the assistance of counsel during his examination. Counsel can fully prepare the defendant to testify before he takes the stand, can object to improper questions during cross-examination, and can attempt to rehabilitate him on redirect examination. This assistance satisfies the Sixth Amendment, which has never been viewed as according a defendant the right to absolute and unlimited consultation with his attorney during every moment of his trial. Rather, "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process * * *." *Herring* v. *New York*, *supra*, slip op., p. 5.

In the light of these considerations, it is not surprising that a number of court of appeals decisions recognize that restrictions upon a defendant's right to communicate with his attorney during the trial do not automatically require reversal of his conviction, but only where the defendant shows that the restriction prejudiced his defense. Thus in *In re Di*

Bella, 17 Crim. L. Rep. 2334 (C.A. 2, decided June 8, 1975), the court upheld the contempt conviction of a recalcitrant grand jury witness where, although his attorney had been excluded from the courtroom for a short time, the record disclosed that the witness had not suffered any resulting prejudice. In *United States* v. *Schrimsher*, 493 F. 2d 848, 854 (C.A. 5), the defendant's conviction was upheld even though his attorney was incarcerated for contempt during a luncheon recess in the trial, since there was no allegation of prejudice or basis for assuming it.

In *United States* v. *Crutcher*, 405 F. 2d 239, 244-245 (C.A. 2), certiorari denied, 394 U.S. 908, the conviction was upheld, although the defendant's attorney was instructed not to communicate with the defendant during a luncheon recess in the trial; the rationale was that the court was not informed of anything that needed to be discussed at that time. Finally, in *United States* v. *Leighton*, 386 F. 2d 822, 823 (C.A. 2), certiorari denied, 390 U.S. 1025, an order prohibiting the defendant and his attorney from consulting during a luncheon recess was harmless error since "we can discern no actual harm * * * and are convinced that there was none". Cf. *Altmayer* v. *Sanford*, 148 F. 2d 161, 162 (C.A. 5).

Indeed, the two cases upon which petitioner relies (Br. 7-11) as indicating that prejudice need not be shown actually support our contrary submission. In *Glasser* v. *United States*, 315 U.S. 60, the trial judge had appointed the same attorney to represent defend-

ants Glasser and Kretske, even though he had been informed that their defenses might be antagonistic. This Court set aside Glasser's conviction after finding that he had been prejudiced by the dual representation. It affirmed Kretske's conviction, however, since "Kretske does not contend that he was prejudiced by the appointment, and we are clear from the record that no prejudice is disclosed as to him" (*id.* at 77).

In *United States* v. *Venuto*, 182 F. 2d 519 (C.A. 3), the conviction was reversed where the trial court had prohibited an illiterate defendant and his attorney from consulting with one another during an overnight recess in a complex trial involving voluminous records. As the Second Circuit pointed out in *United States* v. *Leighton*, *supra*, 386 F. 2d at 823, however, "[t]he harm done by the ruling in those circumstances is self-evident," *i.e.*, prejudice was inherent in the particular circumstances. In both cases the touchstone for upholding or reversing the conviction was the absence or presence of prejudice.

Petitioner himself recognized that he would not have been entitled to a recess at the conclusion of his direct examination to enable him to consult with counsel concerning his cross-examination (*supra*, pp. 7-8). As the district court pointed out, the issue arose in this case only because of the fortuity that the direct examination ended when the trial recessed for the day. Particularly in these circumstances, it would be most inappropriate to hold that the prohibition upon petitioner's discussing his testi-

mony with counsel during the recess automatically requires the reversal of his conviction.[14]

B. Petitioner was not prejudiced by the district court's limitation upon his consultation with counsel during the overnight recess.

The district court did not prohibit all discussion between petitioner and counsel during the recess. To the contrary, the court expressly authorized them to consult at the beginning of the recess with respect to trial strategy and the order of witnesses (Tr. 1152-1153; App. 19). The court also stated that when the redirect examination of petitioner had been completed, counsel would have whatever time he needed to consult with petitioner "about strategies or anything else" (Tr. 1153; App. 19).

Petitioner's counsel himself recognized that he had no "right * * * to coach him as to what he may say on cross-examination or how to answer questions" (Tr. 1151; App. 18-19). Moreover, petitioner in effect concedes that he would not have been prejudiced by an order prohibiting discussion during the recess of the substance of his testimony (Pet. Br. 13):

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[14] The highest courts of three States—Illinois (*People* v. *Noble*, 42 Ill. 2d 425, 248 N.E. 2d 96), Pennsylvania (*e.g.*, *Commonwealth* v. *Vivian*, 426 Pa. 192, 231 A. 2d 301), and Mississippi (*e.g.*, *Pendergraft* v. *State*, 191 So. 2d 830)—have taken a contrary position. For the reasons stated above, we believe that those holdings are unsound. The highest court of at least one State—Michigan (*People* v. *Prevost*, 219 Mich. 233, 189 N.W. 92)—has held that a restriction such as that at issue here is proper. See also *People* v. *Miller*, 185 Cal. App. 2d 59, 8 Cal. Rep. 91, certiorari denied, 365 U.S. 568.

> Why, for example, didn't the trial judge only limit the incommunicado order to no discussion regarding the Defendant's testimony? Would not an admonition to the Defendant and his counsel to not discuss Defendant's testimony be just as effective as limiting or admonitory orders and instructions freely given by the Court to other witnesses and the jury regarding matters of law and fact at other recesses or interruptions during the course of the trial?

The district court explained that it was prohibiting any discussion apart from the conference concerning strategy because of doubt that petitioner would be able to conform to such a limitation (Tr. 1152-1153; App. 19).

In short, petitioner has not shown—and there is no basis for assuming—that the limitation upon consultation with counsel during the overnight recess prejudiced him in any way. The court expressly permitted them to discuss such matters as trial strategy at the outset of the recess and promised to make available additional time for unlimited consultation after petitioner's testimony had been completed. Petitioner's counsel and petitioner apparently both recognize that a ban on discussion of petitioner's direct testimony in anticipation of his cross-examination would have been permissible.

Moreover, this is not a close case in which consultation between petitioner and counsel beyond the strategy discussions authorized was likely to have affected the outcome. As set forth in the Statement (pp. 2-7), there was overwhelming evidence that petitioner was an active participant in a conspiracy

to import a substantial quantity of narcotics and that he possessed a substantial amount of the drug. Petitioner's defense of entrapment—upon which he primarily relied—was negated by substantial evidence of his predisposition to commit the offense and by the testimony of several persons—including co-conspirator Randy Kilgore—that petitioner was the substantial instigator of the conspiracy.

In these circumstances, the court of appeals correctly concluded that "'we can discern no actual harm'" to petitioner as a result of the disputed instruction "'and are convinced that there was none.'" (App. 39), and correctly affirmed petitioner's conviction. *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JOHN P. RUPP,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
VICTOR STONE,
LAUREN S. KAHN,
Attorneys.

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